Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

SCOTT B. MAYBEE D/B/A SMARTSMOKER.COM, BUYCHEAPCIGARETTES.COM AND ORDERSMOKESDIRECT.COM

Petitioner,

v.

STATE OF IDAHO, BY AND THROUGH LAWRENCE G. WASDEN, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1998, the Attorneys General of 46 states, five U.S. territories and the District of Columbia (the "Settling States") settled various legal actions involving antitrust, product liability and consumer protection claims against the nation's four largest tobacco companies. In exchange for substantial sums of monies, tied in part to sales volume, to be paid by settling manufacturers, each Settling State agreed to enact and diligently enforce a qualifying escrow statute that would artificially inflate costs for other tobacco manufacturers and which "effectively and fully neutralizes the cost disadvantage that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers." The question presented to the Court is whether a Settling State may prohibit the sale of certain brands of cigarettes manufactured by tobacco companies that have never been sued, or otherwise alleged or found culpable for conduct giving rise to liability.

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OPINION BELOW

The opinion of the Supreme Court of the State of Idaho ("Idaho Supreme Court") is reported at 148 Idaho 520, 224 P.3d 1109 (2010) and is reprinted in the Appendix, App. 1-37. The memorandum decision and order of the District Court for the Fourth Judicial District of the State of Idaho, in and for the County of Ada ("District Court"), granting summary judgment in favor of Respondent and affirmed by the Idaho Supreme Court, is unreported, but is reprinted in the Appendix, App. 38-49.

JURISDICTION

The Idaho Supreme Court filed its opinion on January 15, 2010, affirming the judgment entered by the District Court on February 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 1

Article I of the United States Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

U.S. Const. Art. I, § 8, cl. 3

The Commerce Clause of the United States Constitution provides, "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian

Tribes."

U.S. Const. Art. I, § 10, cl. 2

The Import-Export Clause of the United States Constitution provides, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; . . . ."

U.S. Const. Art. VI, cl. 2

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Idaho Code § 39-8401

The Tobacco Master Settlement Agreement Complementary Act (the "Complementary Act"), codified at Title 39, Chapter 78 of the Idaho Code, was enacted as "procedural enhancements [to] help prevent violations of Idaho's tobacco master settlement agreement act and thereby safeguard the master settlement agreement, the fiscal soundness of the state and the public health."

Idaho Code § 39-8403

The Complementary Act contains a certification provision, codified at Idaho Code § 39-8403(1), which provides:

> Every tobacco product manufacturer whose cigarettes are sold in this state whether directly or through a wholesaler, distributor, retailer or similar intermediary or intermediaries shall execute and deliver . . . a certification to the attorney general . . . certifying, under penalty of perjury, that . . . such tobacco manufacturer is either: a participating manufacturer [to the Master Settlement Agreement] or in full compliance with [the escrow payment requirements set forth in] section 39-7803(b), Idaho Code, including all quarterly installment payments required by section 39-8405(5), Idaho Code. . . .
>
> (b) A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families that were sold in the state at any time . . .
>
> (d) A tobacco product manufacturer may not include a brand family in its certification unless: . . . .
>
> (ii) In the case of a nonparticipating manufacturer, said non-

> participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of [calculating escrow payments pursuant to] section 39-7803(b), Idaho Code.

The directory provision, Idaho Code § 39-8403(2), provides:

> [T]he attorney general shall develop and publish on his website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (1) of this section, and all brand families that are listed in such certification . . .

The prohibitive provision, Idaho Code § 39-8403(3), provides:

> It shall be unlawful for any person:
>
> (a) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory;
>
> (b) To sell, offer or possess for sale in this state, cigarettes of a tobacco manufacturer or brand family not included in the directory;
>
> (c) To acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribu-

> tion or sale in the state in violation of this subsection (3)

The Complementary Act is re-printed in the Appendix, App. 69-81.

STATEMENT OF THE CASE

The case concerns the authority of a State to prohibit interstate sales of certain cigarette brands manufactured by companies that are not parties to the Master Settlement Agreement.

A. Factual Background

Scott B. Maybee ("Maybee") is an enrolled member of the Seneca Nation of Indians ("Seneca Nation"), a federally recognized Indian tribe whose tribal territory is located within western New York State. Maybee is authorized and licensed by the Seneca Nation to conduct business as a tobacco retailer on the Seneca Nation Allegany Territory.

From his place of business on tribal land, Maybee offers adult smokers nationwide a variety of tobacco products for their personal use and consumption. Those tobacco products include cigarette brands not commonly available in brick-and-mortar stores, manufactured by small domestic or foreign manufacturers. Native American manufacturers are among the domestic and foreign manufacturers whose brands are sold by Maybee. All manufacturers or their importers hold federal permits and pay federal excise taxes, authorizing these brands to be sold in the United States.

Age-verified Idaho adults are among Maybee's consumers who purchase cigarettes and other tobacco products in non-face-to-face transactions, known as "delivery sales." Maybee receives tobacco orders from adult consumers via phone, mail, fax or other electronic transmissions, and then completes these non-face-to-face sales by delivering products to the United States Postal Service. Maybee completes these delivery sales without leaving his place of business on the Seneca Nation Allegany Territory.

Maybee has no outlets, offices, employees, sale representatives, agents, inventory or other tangible property in Idaho. His only contact with his Idaho consumers is through instruments of interstate commerce. Having no substantial nexus to Idaho, he has sold cigarettes to Idaho smokers, for which Idaho taxes have not been pre-collected through the affixing of Idaho tax stamps. Maybee, however, informs his delivery customers they are responsible for the payment of all applicable state and local tobacco taxes. He then reports all interstate sales and shipments to the State taxing authority pursuant to the provisions of the Jenkins Act, 15 U.S.C. § 375 *et seq.*

The State of Idaho, by and through Lawrence G. Wasden, Attorney General ("Idaho") brought this action against Maybee seeking to enjoin him from offering or selling, in interstate commerce, certain cigarette brands to Idaho consumers. The brands at issue are manufactured by tobacco companies that are not parties to the 1998 Master Settlement Agreement ("non-participating manufacturers"). Because these manufacturers have never been sued, or otherwise alleged or found culpable for conduct giv-

ing rise to liability, they are not parties to any settlement agreement. Nonetheless, Idaho asserts, under state law, brands manufactured by these non-participating manufacturers may not be sold to Idaho consumers.

B. Statutory Background

On November 23, 1998, the Attorneys General of 46 states, five U.S. territories and the District of Columbia (the "Settling States") settled various legal actions involving antitrust, product liability and consumer protection claims against the nation's four largest tobacco companies, Phillip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson. The agreement became known as the Master Settlement Agreement.

In exchange for releases of past, present and certain future claims brought against them, these settling manufactures ("participating manufacturers") agreed "to pay substantial sums" to the Settling States on an annual basis. The original participating manufacturers knew they would have to substantially raise cigarette prices to pay for their annual financial obligations to these Settling States. They also knew, by raising their prices, other non-participating manufacturers would have a competitive price advantage reducing the overall market share for participating manufacturers.

As part of the agreement, Settling States agreed to enact and diligently enforce qualifying escrow statutes that "effectively and fully neutralize" competition from non-participating manufacturers. Such statutes impose financial obligations on non-

participating manufacturers by requiring them to make escrow payments based on the number of stamped cigarettes sold in a Settling State. To ensure compliance with the terms of the Master Settlement Agreement, the settling parties attached a model qualifying statute to the agreement. Most, if not all, Settling States have enacted the model qualifying statute that obligates non-participating manufacturers to make escrow payments.[1] Idaho is one of the Settling States.

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[1] *Compare* Idaho Code § 39-7803 (2010) *with* Ala. Code § 6-12-3n (2010); Alaska Stat. § 45.53.020 (2010); Ariz. Rev. Stat. Ann. § 44-7101 (2010); Ark. Code Ann. § 26-57-261 (2010); Cal. Health & Safety Code § 104557 (West 2010); Colo. Rev. Stat. § 39-28-203 (2010); Conn. Gen. Stat. § 4-28i (2010); Del. Code Ann. tit. 29, § 6082 (2010); D.C. Code § 7-181.02 (2010); Ga. Code Ann. § 10-13-3 (2010); Haw. Rev. Stat. § 675-3 (2010); 30 Ill. Comp. Stat. Ann. 168/15 (West 2010); Ind. Code § 24-3-3-12 (2010); Iowa Code Ann. § 453C.2 (West 2010); Kan. Stat. Ann. § 50-6a03 (2010); La. Rev. Stat. Ann. §13:5063 (2010); Me. Rev. Stat. Ann. tit. 22 § 1580-I (2010); Md. Code Ann., Bus. Reg. § 16-403 (West 2010); Mass. Gen. Laws ch. 94E, § 2 (2010); Mich. Comp. Laws § 445.2052 (2010); Mo. Rev. Stat. § 196.1003 (2010); Mont. Code Ann. § 16-11-403 (2010); Neb. Rev. Stat. § 69-2703 (2010); Nev. Rev. Stat. § 370A.140 (2010); N.H. Rev. Stat. Ann. § 541-C:3 (2010); N.J. Stat. Ann. § 52:4d-3 (West 2010); N.M. Stat. § 6-4-13 (2010); N.Y. Pub. Health Law § 1399-pp (McKinney 2010), N.C. Gen. Stat. § 66-291 (2010); N.D. Cent. Code § 51-25-02 (2010); Ohio Rev. Code Ann. § 1346.02 (West 2010); Okla. Stat. Ann. tit. 37 § 600.223 (West 2010); Or. Rev. Stat. § 323.806 (2010); 35 Pa. Stat. Ann. § 5674 (West 2010); R.I. Gen. Laws § 23-71-3 (2010); S.C. Code Ann. § 11-47-30 (2010); S.D. Codified Laws § 10-50B-7 (2010); Tenn. Code Ann. § 47-31-103 (2010); Utah Code Ann. § 59-22-203 (2010); Vt. Stat. Ann. tit. 33, § 1914 (2010); Wash. Rev. Code § 70.157.020 (2010); W. Va. Code § 16-9B-3 (2010); Wyo. Stat. § 9-4-1202 (2010); Guam Code Ann., tit.5,§ 221203 (2010); P.R.

In 1999, Idaho enacted the Tobacco Master Settlement Agreement Act, codified at Title 39, Chapter 78 of the Idaho Code, as its qualifying escrow statute (the "Escrow Statute" or "MSAA"). The Escrow Statute imposes on non-participating manufacturers "selling cigarettes to consumers within the state" an obligation to make escrow payments on the number of stamped cigarettes sold in Idaho. Idaho Code § 39-7803.

Not all brands sold to Idaho consumers are subject to escrow payments. Participating manufacturers are not subject to such payments. *Id.* Non-participating manufacturers that have never been sued or found culpable for conduct giving rise to liability are the only manufacturers required to make escrow payments. *Id.*

Escrow funds are payable to the State only if a non-participating manufacturer is later found culpable for conduct giving rise to liability to the State. Idado Code §§ 38-7801(f), 39-7803(b)(2). If no culpable conduct is ever established, these funds are released from escrow and returned to the non-participating manufacturer after 25 years. Idaho Code § 39-7803(b)(2).

By requiring non-participating manufacturers to make payments prior to a court finding culpable conduct, the Escrow Statute achieves its real objective -- artificially inflating costs for non-participating manufacturers and thereby "effectively and fully neutralizes the cost disadvantage" that participating

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Laws Ann. tit. 24, § 15002 (2010); 27 V.I. Code R. § 305d (Weil 2010).

manufacturers would have suffered by raising their prices to cover their settlement costs. Ironically, consumers and non-participating manufacturers ultimately pay the cost for the alleged culpable conduct of settling manufacturers.

Non-participating manufacturers are required to make escrow payments based on the number of "units sold" in Idaho (i.e. the number of stamped cigarettes sold in the State). Idaho Code §§39-7802(j); 39-7803(b)(1). Since escrow payments are based on the number of "units sold," not the "units used," in Idaho, unstamped cigarettes sold in interstate commerce are not considered "cigarettes sold in the state" for purposes of the Escrow Statute. Consequently, Idaho concedes unstamped cigarettes sold by Maybee do not trigger the application of the Escrow Statute.

In 2003, the Idaho Legislature found violations of the Escrow Statute threatened the integrity of the Master Settlement Agreement, the fiscal soundness of the State and the public health. Idaho Code § 39-8401. The Tobacco Master Settlement Agreement Complementary Act (the "Complementary Act"), codified at Title 39, Chapter 78 of the Idaho Code, was enacted so non-participating tobacco manufacturers could not avoid their escrow obligations under the Escrow Statute. (App. 3) ("[T]he goal of the Complementary Act was to prevent end-runs around the fee requirement of the MSA and the escrow requirement" of the Escrow Statute). It imposes obligations not only on tobacco manufacturers, but also on any "wholesaler, distributor, retailer, or similar intermediary or intermediaries"

(collectively, "tobacco dealers") that distribute cigarettes for sale in Idaho. Idaho Code § 39-8401 *et al.*

The Complementary Act requires "[e]very tobacco manufacturer whose cigarettes are sold in this state" to certify to the Idaho Attorney General "a complete list of all of its brand families that were sold in the state at any time." Idaho Code § 39-8403(1)(b). A non-participating manufacturer may only include on its certified list brands that are subject to escrow payments. Idaho Code § 39-8403(1)(d).

From these manufacturers' certifications, the Attorney General develops and publishes a directory of all cigarette brands that are certified and approved for sale in Idaho (the "Directory"). Idaho Code § 39-8403(2). Cigarettes not listed on the Directory may not be distributed, sold, stamped, offered, or possessed "for sale in this state." Idaho Code § 39-8403(3).

C. State Court Proceedings

On September 22, 2006, Idaho filed its verified complaint in the District Court. The complaint alleges Maybee violated the Complementary Act by selling and offering for sale to Idaho consumers cigarettes not listed on the Directory. After hearing cross-motions for summary judgment, the Honorable Kathryn A. Sticklen granted summary judgment in favor of Idaho. (App. 48). After denying Maybee's motion for reconsideration, the District Court entered a judgment enjoining Maybee from selling cigarettes not listed on the Directory. (App.50-53).

Maybee appealed to the Idaho Supreme Court. He argued the Complementary Act could not be statutorily or constitutionally enforced against an out-of-state Native American delivery seller who sells unstamped cigarettes outside of Idaho, which are delivered to Idaho consumers by the United States Postal Service. The Idaho Supreme Court rejected Maybee's argument and affirmed the District Court's judgment.

In an opinion issued on January 15, 2010, the Idaho Supreme Court ruled although the Escrow Statute "regulates only stamped cigarettes," "the plain language of the Complementary Act demonstrates a legislative intent to regulate the sale of all cigarettes," both stamped and unstamped. (App. 18). The Court found:

> [U]nder Maybee's proposed interpretation, Non-Participating Manufacturers based outside of Idaho could avoid their escrow obligations altogether by simply selling their cigarettes directly to Idaho consumers through the mail, or through an out-of-state retailer who would sell directly to Idaho consumers through the mail, rather than through in-state wholesalers and retailers. . . .[T]his argument glosses over the fact that . . . Non-Participating Manufacturers that do not comply with the MSAA's escrow requirements deprive the State of financial assets, which are needed to defray medical care costs that have arisen as a result of tobacco-related health issues.

(App. 18). For these reasons, the Court held Idaho had the statutory authority to enforce the Complementary Act against Maybee.

The Idaho Supreme Court then rejected Maybee's constitutional defenses. In regard to the dormant aspects of the Interstate Commerce Clause, the Court ruled:

> There is no evidence that Idaho's Complementary Act treats interstate sellers any differently from intrastate sellers, that the burdens on interstate commerce outweigh the local benefits, nor that the Act is attempting to regulate activities occurring wholly outside of Idaho. Therefore, we hold that the Complementary Act, as interpreted, is not preempted by the Interstate Commerce Clause.

(App. 26-27). Finally, the Court found no violation of the Indian Commerce Clause, ruling "the regulated conduct occurred off-reservation, and so the *Bracker* balancing test does not apply." (App. 34).

D. Enactment of the PACT Act

After the Idaho Supreme Court issued its opinion, President Barack Obama signed the Prevent All Cigarette Trafficking ("PACT") Act into law on March 31, 2010. PACT Act, Pub. L. No. 111-154, 124 Stat. 1087. The PACT Act amends three federal statutes: the Jenkins Act, 15 U.S.C. § 375 *et seq.*; the Postal Crime Act, 18 U.S.C. § 1691 *et seq.*; and the Cigarette Contraband Trafficking Act ("CCTA"), 18

U.S.C. § 2341 *et seq.* All amendments, except those to the CCTA, will take effect on June 29, 2010. PACT Act, Pub. L. No. 111-154, § 6, 124 Stat. 1087, 1110-11.

After June 29, 2010, delivery sellers will be required to pay state and local tobacco taxes on cigarettes and smokeless tobacco sold in interstate commerce to consumers. *Id.*, § 2, 124 Stat. at 1093. Any required tax stamps or other indicia must be properly affixed or applied to cigarettes before being shipped to consumers in interstate commerce. *Id.* The PACT Act is not in any way "meant to create a precedent regarding the collection of State sales or use taxes by, or the validity of efforts to impose other types of taxes on, out-of-State entities that do not have a physical presence within the taxing State." *Id.* § 8, 124 Stat. at 1111.

In an earlier version of the PACT Act, its initial sponsors intended tobacco manufacturers and importers to be subject to those state laws requiring escrow payments on all cigarettes bearing state tax stamps. *Compare* 155 Cong. Rec. S5859-60 (daily ed. May 21, 2009)(Sec. 4. Compliance with Model Statute or Qualifying Statute) *with* Pub. L. No. 111-154, §§ 3-5, 124 Stat. 1087, 1103-10. The Senate removed these provisions from the final version which was signed into law. *Id.* Additionally, nothing in the PACT Act should be construed to amend, modify, or otherwise effect:

> any limitation under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax

> and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country [or] . . . any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes . . . .

Pub. L. No. 111-154, § 5, 124 Stat. at 1110. Consequently, the PACT Act preserves for review Maybee's constitutional challenges to Idaho's Escrow Statute and Complementary Act.

REASONS FOR GRANTING THE PETITION

A State, like Idaho, has a legitimate interest in stopping its citizens from smoking and in raising revenues to cover the smoke-related medical costs incurred for its citizens. States, therefore, may impose a nondiscriminatory tax or otherwise regulate the distribution, sale and possession of all cigarettes, which come within their respective borders, as part of the "regulatory sphere traditionally occupied by . . . the States" for the health, safety and welfare of its citizens. *General Motors Corp. v. Tracy*, 519 U.S. 278, 313 (1997) (Scalia, J., concurring). Yet, despite its health-effects, no State, including Idaho, has banned adult smokers from purchasing or using cigarettes. Cigarettes are, therefore, a lawful product available for sale in local gas stations, drug

stores, grocery and convenience stores within Idaho, and through vendors who sell and ship in interstate commerce.

I. THE CONFLICT PRESENTED BY THE IDAHO TOBACCO SCHEME RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW AND DRAWS INTO DOUBT THE VALIDITY OF STATUTES ADOPTED BY A MAJORITY OF STATES.

The Framers of the United States Constitution envisioned a national, free market, unobstructed by state and local boundaries and restraints, "to ensure the liberty and progress of the whole Nation and its people." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 362 (2008) (Kennedy, J., dissenting).

> [E]very farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949). *Id.* at 206-07.

In this case, Petitioner asserts Idaho and other Settling States have strayed from their traditional exercise of police powers and have usurped the authority given to Congress under the Constitution. The Court is called upon to review state tobacco statutes limiting access to certain brands sold in interstate commerce and which artificially inflate costs for some cigarettes sold in interstate commerce. The avowed purpose "effectively and fully neutralizes the cost disadvantage" experienced by large tobacco manufacturers. The financial incentives given by these large tobacco manufacturers to Settling States for enacting and diligently enforcing such statutes does not justify the burdens placed on their smaller competitors that ultimately shoulder the burdens of these financial incentives.

A. The Idaho Opinion Offers this Court Another Opportunity to Debate the Constitutional Scope of the Negative Commerce Clause.

Article I of the United States Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1. Among the enumerated powers granted to Congress in Article I is the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. Although the Commerce Clause does not expressly reserve power to, or restrain the power of "the several States," the Court has read a negative implication limiting the exercise of State regulatory authority in the absence of express congressional

consent. *Davis*, 553 U.S. at 337; *but see Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part) ("The historical record provides no grounds for reading the Commerce Clause to be other than what it says -- an authorization for Congress to regulate commerce.").

The Court's dormant cases have invalidated two types of local barriers to a free and open national market. First are laws discriminating against interstate commerce. Second are laws imposing unreasonable burdens upon interstate commerce. *Davis*, 553 U.S. at 338-39.

In recent years, the Court has "struggled (to put it nicely) to develop a set of rules . . . [to] preserve a national market without needlessly intruding upon the States' police powers." *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 596 (1997) (Scalia, J., with whom Chief Justice Rehnquist, Justices Thomas and Ginsburg joined, dissenting). Some members of the Court have commented the "negative Commerce Clause jurisprudence has drifted far from its moorings," designed originally to foster a national market for commercial activity. *Id.* at 595. But one thing is certain -- the Court's perception of the negative Commerce Clause is shifting.

Courts, attorneys and legislators throughout the Nation look to this Body to guide them as to the constitutional limits placed on governmental power.

> People want to know under what circumstances and how far they will run

> the risk of coming against what is so much stronger than themselves, and hence it becomes a business [for lawyers] to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

Petitioner is a Native American tobacco seller who has sold cigarettes to Idaho consumers. Under the Uniform Commercial Code § 2-401(2), codified at Idaho Code § 28-2-401(2), Petitioner's sales to Idaho consumers took place outside of Idaho, on the Seneca Nation territory located in western New York State. Idaho's Complementary Act prohibits a person from selling or offering unlisted cigarettes "for sale in this state." Idaho Code § 39-8403(3)(b). The Complementary Act does not define a sale or an offer for sale. Petitioner reasonably believed his sales of unstamped cigarettes did not trigger the application of the Complementary Act.

Idaho had home "court" advantage in arguing these questions of first impression. In regard to Maybee's statutory claims, the Idaho Supreme Court ruled, without citation to any common or statutory law, in favor of Idaho and held:

> [T]he Uniform Commercial Code is irrelevant to the determination of where Maybee's cigarette sales took place, and that those cigarette sales did, in fact,

> take place in Idaho for purposes of the Complementary Act.

(App. 23).

Petitioner now seeks review by this Court of his constitutional claim and a determination as to which "path" the negative Commerce Clause will take with respect to these challenged statutes adopted by 46 states, the District of Columbia and five United States territories.

1. *The Tobacco Scheme Discriminates Against Goods Sold in Interstate Commerce.*

Nothing on the face of the Complementary Act discriminates against interstate commerce. The Idaho Supreme Court found the Complementary Act "prohibits both intrastate and interstate parties from selling or offering for sale, Noncompliant Cigarettes in Idaho. *See* I.C. § 39-8403(3)." (App. 25). However, when the Complementary Act is read *in pari materia* with the Escrow Statute, the scheme reveals its discriminatory effect. *Compare* Idaho Code § 39-7803 *with* Idaho Code § 39-8403.

An out-of-state delivery seller cannot sell brands unless the tobacco manufacturer has certified the brand for sale in the state with the Attorney General. Idaho Code § 39-8403(3)(b). (App. 23). The Attorney General will not certify a brand unless the brand has been stamped and sold in the State at one time, thereby triggering the tobacco manufacturer's obligation under the Escrow Statute. *Cf.* Idaho Code § 39-8403(1)(d)(ii). Although tobacco manufacturers

are not obligated to make escrow payments on unstamped cigarettes sold in interstate commerce, the current scheme creates an unconstitutional "catch-22" for both the manufacturer and the delivery seller. *Compare* Idaho Code § 39-7802(j) *with* Idaho Code § 39-7803(1)(b).

A manufacturer cannot certify a brand unless the cigarettes are subject to escrow payments and only cigarettes stamped and sold in the State are subject to escrow payments. *Compare* Idaho Code § 39-8403(1)(d)(ii) *with* Idaho Code § 39-7803(1)(b). Based on the ruling of the Idaho Supreme Court, a delivery seller cannot sell unstamped brands in interstate commerce to Idaho consumers unless those brands have been certified for sale (App. 36) and therefore, must been sold by in-state tobacco sellers at one time. In other words, an out-of-state delivery seller can sell or offer for sale only brands previously available to consumers by in-state sellers. Idaho consumers are denied access to interstate delivery sellers offering a wide variety of brands, not available for sale at local brick-and-mortar outlets. Small manufacturers are closed out of the local market by in-state brick-and-mortar sellers that have not and will not carry their brands due to their limited retail shelf space and distribution agreements with large tobacco manufacturers, which restrict offering competing brands. More importantly, Idaho consumers have no reason to purchase brands already available locally from out-of-state delivery sellers. The only competitive advantage delivery sellers once had was the ability to offer consumers a wide variety of brands at affordable prices. This advantage is "effectively and fully"

eliminated by this regulatory scheme. The scheme, therefore, benefits local interests by burdening out-of-state competitors. *Davis*, 553 U.S. at 337.[2]

2. *The Tobacco Scheme Directly Regulates and Unduly Burdens Interstate Commerce.*

The negative Commerce Clause debate within the Court has focused on the "undue burden" rule to which various balancing tests have been applied. On one side of the debate are those who argue the doctrine "remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act." *Davis*, 553 U.S. at 364-65 (Kennedy, J., with whom Justice Alito joined, dissenting). On the other side are those who argue "balancing of various values" should be left to Congress, "which is precisely what the Commerce Clause . . . envisions." *United Haulers Assn., Inc. v.*

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[2] In rejecting Petitioner's statutory argument that his out-of-state sales do not trigger the application of either the Escrow Statute or the Complementary Act, the Idaho Supreme Court found:

> [U]nder Maybee's proposed interpretation, Non-Participating Manufacturers based outside of Idaho could avoid their escrow obligations altogether by simply selling their cigarettes directly to Idaho consumers through the mail, or through an out-of-state retailer who would sell directly to Idaho consumers through the mail, rather than through in-state wholesalers and retailers. Such a result would violate not only the spirit of the [Master Settlement Agreement] but also Idaho public policy, and would be detrimental to the fiscal soundness of the State. (App. 18)

Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 349 (2007) (Scalia, J., concurring in part); *Camps*, 520 U.S. at 619 (Thomas, J., with whom Chief Justice Rehnquist and Justice Scalia joined, dissenting). Inevitably, the majority of the Court has refrained from preempting State authority in cases in which "a cost-benefit analysis would be a very subtle exercise." *Davis*, 553 U.S. at 353-54; *see also id.* at 360 ("It is a matter not of weighing apples against apples, but of deciding whether three apples are better than six tangerines. . . . Of course you cannot decide which interest 'outweighs' the other without deciding which interest is more important to you.") (Scalia, J., concurring in part). The negative Commerce Clause analysis in this case, however, would not require the Court to engage in a "subtle" exercise of deciding "whether three apples are better than six tangerines."

Prior to the enactment of the PACT Act, non-participating manufacturers had no obligation to make escrow payments on unstamped cigarettes sold in interstate commerce to consumers. The Idaho Supreme Court, however, would prevent these manufacturers' brands from being directly sold to consumers in interstate commerce. (App. 18). After the PACT Act goes into effect, all cigarettes sold in interstate commerce will be required to be stamped prior to sale, thereby triggering the application of qualifying escrow statutes in 51 jurisdictions.

The escrow and certification requirements mandated by these qualifying and complementary statutes impose obligations on both domestic and foreign manufacturers exporting products into one of

the 51 Settling States. These requirements can only be satisfied by these manufacturers, and not by an importer, "wholesaler, distributor, retailer or similar intermediary." A non-participating manufacturer whose brands are sold in any Settling State must establish a separate escrow account for each State. Given the chain of distribution between the manufacturer and the ultimate consumer, the certification procedure is cumbersome, particularly for foreign manufacturers. A non-participating manufacturer does not have access to records kept by State stamping agents or State taxing authorities, which would show the number of cigarettes stamped for sale in a particular State. In many Settling States, this information is not subject to public disclosure and is confidential. This information, however, is necessary for the non-participating manufacturer to fulfill its post-PACT Act escrow and certification obligations.

This challenge also presents a new wrinkle yet to be explored by the Court. At the core of each dormant case analysis conducted by this Court has been a regulatory scheme to which a State claimed a present interest in the activity being regulated. *See, e.g., Quill v. North Dakota*, 504 U.S. 298 (1992) (reviewing a nondiscriminatory sales tax from in-state and out-of-state vendors); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (reviewing milk subsidies to local farmers). Petitioner has discovered no dormant cases in which the Court has been confronted by a State regulatory scheme seeking to preserve an "anticipatory" interest in an uncertain future event. The Court, however, has resolved such conflicts in the context of the Indian Commerce

Clause. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

In Indian Commerce Clause cases, the Court has held a State's interest in an unrealized event does not permit a State to regulate activities taking place on an Indian reservation by tribal and non-tribal members. In *Cabazon*, California's sole interest in enforcing its state gaming laws on tribal gambling enterprises was the possibility high stakes gaming might attract organized crime. 480 U.S. at 220-21. California did not allege "any present criminal involvement" with these tribal gambling enterprises. *Id*, at 221. Consequently, the Court was unconvinced such remote interests were "sufficient to escape the pre-emptive force of federal and tribal interests" implicated in that case. *Id.*

In *Mescalero*, New Mexico attempted to enforce state hunting and fishing laws against non-tribal members on tribal land. The Court stated a "State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." 462 U.S. at 336.

To justify the exercise of State authority, New Mexico claimed in *Mescalero* it had an interest in wildlife conservation and in the collection of state licensing fees. *Id.* at 342-43. New Mexico conceded, on-reservation hunting by tribal and non-tribal members had no adverse impact on fish and wildlife outside the reservation. *Id.* at 342. New Mexico's "general desire to obtain revenue" from the collection

of licensing fees was, in the Court's view, "inadequate to justify the assertion of concurrent jurisdiction" with the tribe. *Id.* at 343. Even though New Mexico could point to a possible off-reservation effect, the Court ruled those possible effects were not sufficient to justify state intervention to regulate the on-reservation conduct of ***non-tribal*** members. *Id.* at 342-343.

Unlike non-discriminatory excise taxes collecting public revenues, Idaho and other Settling States require non-participating manufacturers to make payments into a State-specific escrow account. Escrow funds are held in private accounts, identified and reserved for the State. These "reserve funds" are not assets of the State and are subject to recovery by a State only if it has reached a settlement with the manufacturer or the manufacturer has engaged in culpable conduct for which a court has rendered a judgment in favor of the State. Idaho Code §§ 39-7801(d), 7803(b)(2)(A). These "reserve funds" are released after 25 years if no settlement or judgment has depleted such funds. The State's interest in this escrow scheme can be called, at best, contingent or, at worst, speculative. The Court needs to examine whether a State's anticipatory interest in an uncertain event sufficiently justifies burdens currently placed on interstate commerce.

B. The Court Should Grant Certiorari and Examine the Textual Limitations Imposed by the Import-Export Clause on State Authority.

Several members of the Court have written "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps*, 520 U.S. at 610 (Thomas, J., with whom Chief Justice Rehnquist and Justice Scalia joined, dissenting) *citing Tyler*, 483 U.S. at 263 (Scalia, J., concurring in part and dissenting in part). Justice Thomas has not only urged the Court to "confine itself to interpreting the text of the Constitution," but also to re-examine the textual provision of the Import-Export Clause, "which itself seems to prohibit in plain terms certain of the more egregious state taxes on interstate commerce." *Camps*, 520 U.S. at 621 (Thomas, J., with whom Justice Scalia joined, dissenting).

Article I, § 10, cl. 2, of the Constitution provides "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports...."

> To the 20th-century reader, the Clause appears only to prohibit States from levying certain kinds of taxes on goods imported from or exported to *foreign* nations. But a strong argument can be made that for the Constitution's Framers and ratifiers-representatives of States which still viewed themselves as

> semi-independent sovereigns -- the terms "imports" and "exports" encompassed not just trade with foreign nations, but trade with *other States* as well.

Camps, 520 U.S. at 621 (Thomas, J., with whom Justice Scalia joined, dissenting); *cf Woodruff v. Parham*, 68 U.S. (8 Wall.) 123 (1869) (holding the Import-Export Clause applied only to foreign trade). Justice Thomas suggests the Court's Civil War era decision in *Woodruff* was "wrongly decided" given "the common 18th-century understanding of the "terms 'imports' and 'exports'. . . ." *Camps*, 520 U.S. at 621-36. For this reason, Petitioner requests the Court re-examine its holding in *Woodruff* and examine the Escrow Statute and Complementary Act in the context of the Import-Export Clause.

II. THIS CASE RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION INVOLVING A STATE'S REGULATORY AUTHORITY OVER RESERVATION CONDUCT, IS INCONSISTENT WITH THE CONSTITUTIONAL BENCHMARKS SET FORTH BY THIS COURT IN ITS PRIOR DECISIONS, AND DEMANDS FURTHER REVIEW BY THIS COURT

Although "the Interstate Commerce and Indian Commerce Clauses have very different applications," both are "grant[s] of authority to the Federal Government at the expense of the States." *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Seminole Tribe of Florida v. Florida*,

517 U.S. 44, 62 (1996). "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Id.* The Idaho Supreme Court, however, gave short shrift to both defenses, each asserting Idaho lacked civil regulatory authority to enforce its escrow and complementary statutes.

In prior Indian jurisprudence cases, this Court has resolved regulatory conflicts arising from the on-reservation activities of Indians and non-Indians ***within*** a State's borders. *See, e.g., California v. Cabazon*, 480 U.S. 202; *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Mescalero*, 462 U.S. 324; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Williams v. Lee*, 358 U.S. 217 (1959). But the Court has never had the occasion to examine conflicts concerning on-reservation conduct taking place outside of a State. Nonetheless, it logically follows a State should have more, not less, regulatory authority over conduct within its borders as compared to conduct outside its borders.

A. The Idaho Supreme Court Misapplied the Who/Where Preemption Analysis Established in *Wagnon v. Prairie Band Potawatomi Nation*.

This Court has set forth several basic benchmarks with respect to the civil regulatory authority of States involving the conduct of Indians and non-Indians. *Bracker*, 448 U.S. at 141. When a State's civil regulatory authority is being challenged, "who"

is being impacted by a state statute and "where" the conduct being regulated takes place are two questions "hav[ing] significant consequences." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005).

Undisputedly, a State has the authority to regulate the off-reservation conduct of non-Indians taking place within its borders. *See, e.g., Wagnon*, 546 U.S. 95 (ruling Kansas may tax a non-Indian distributor's off-reservation receipt of fuel without being subject to the *Bracker* interest-balancing test). When tribal nations or their members leave the physical boundaries of their reservation, they may also be "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (holding a state could impose a nondiscriminatory gross receipts tax on a tribe-operated ski resort on off-reservation land). States, therefore, are not preempted from regulating off-reservation conduct absent express federal law.

"[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation. . . [I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Id.* at 331-32. The most difficult questions arise where a state asserts authority over on-reservation conduct of non-Indians. *Bracker*, 448 U.S. at 144. In these instances, a state must have a significant regulatory interest outweighing federal and tribal interests. *Id.* at 145. When reservation conduct involving only Indians is at issue, state laws are generally inapplic-

able. *Id.* at 144. In these instances, the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *Id.* (citing *Moe*, 425 U.S. at 480-81). Federal preemption of on-reservation conduct "is not limited to cases in which Congress has expressly -- as compared to impliedly -- pre-empted the state activity," even when such conduct involves non-Indians. *Cotton*, 490 U.S. at 176-77 (1989).

The Idaho Supreme Court correctly observed:

> In determining how to analyze any state statute that allegedly is in conflict with the Indian Commerce Clause, it is crucial to determine, as a preliminary inquiry: (1) whether the regulated conduct occurs on or off a reservation; (2) whether or not the party being regulated is a tribal member; and (3) if the conduct being regulated does occur on a reservation, whether State interests outside the reservation are implicated. (App.31)

It found although the Complementary Act:

> regulate[s] the activities of Maybee, a member of the Seneca Nation. . . the [Act did] not regulate Maybee's on-reservation activities, but rather his off-reservation conduct of: selling, and offering for sale, Noncompliant Cigarettes, in Idaho . . . Whether Maybee delivers Noncompliant Cigarettes to Idaho

> consumers personally, or through a common carrier, this conduct is ultimately traceable to Maybee. (App. 32).

The Idaho Supreme Court found "one case from the Supreme Judicial Court of Maine" to be "particularly instructive on this point" of where the regulated conduct took place. (App. 33). *See Dept. of Health and Human Services v. Maybee*, 975 A.2d 55 (Me. 2009) (the "Maine Case").[3]

In the Maine Case, the court found "Maybee's customers are not on the reservation" when they purchased "their cigarettes through the Internet or by mail order, and accept delivery in Maine." *Id.*, ¶ 8, A.2d at 57. The Maine Supreme Judicial Court ruled the *Bracker* balancing test only applies when a State "seeks to regulate conduct that takes place ***entirely*** on a reservation." *Id.*, ¶ 11, A.2d at 57. (emphasis added).

> Maybee's interactions with consumers in Maine extend beyond the boundaries of the reservation. Activity of tribal members that takes place within the reservation but has an impact outside

[3] In the Maine Case, Petitioner Maybee argued that Native American tobacco sellers were not subject to state licensing requirements, citing for support, *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1974), *aff'd*, 425 U.S. 463 (1976). After the case was held by Maine's highest court, the Maine Legislature repealed the statute at issue, 22 Me. Rev. Stat. Ann. § 1555-C.

> the reservation may be regulated by the states.

Id., ¶ 12, A.2d at 57.

Under this rationale, both Maine and Idaho could claim to have regulatory authority over Maybee's out-of-state wholesale suppliers since cigarettes not listed on their directories are "ultimately traceable" to them, as well. Just as these wholesalers conduct their business transactions outside of Idaho, Maybee's activities occur on the Seneca Nation territory and therefore, his culpability is traceable to on-reservation conduct with the off-reservation effect of introducing cigarettes into Idaho. For this reason, Idaho's assertion of authority is subject to analysis under *Bracker*.

B. The Idaho Supreme Court Should Have Applied the *Bracker* Interest-Balancing Test.

Because Idaho customers do not physically enter the reservation to purchase goods, the Idaho Supreme Court bypassed the interest-balancing analysis and treated Maybee's conduct as if it took place off the reservation. (App. 33-34). For this reason, the opinion failed to address the effect Petitioner's on-reservation conduct had in Idaho.

The Complementary Act regulates tobacco sellers, not consumers. Although consumers placing orders "through the Internet or by mail" do not come onto the reservation, the *Bracker* analysis is still applicable. This Court has examined other cases concerning reservation Indians selling tobacco

products to non-Indians for their off-reservation use. *See, e.g., Moe*, 425 U.S. 463, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), *Dep't of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). Those cases, however, dealt with consumers who physically came onto the reservation to purchase cigarettes, but it is a distinction without a difference.

Reservation delivery sales cannot be distinguished from face-to-face reservation sales in the preemption analysis. Both are made by tobacco sellers from businesses on the reservation. Both involve sales to non-Indian consumers for their off-reservation use. Neither tobacco seller is involved in the transporting of tobacco products off the reservetion. In face-to-face transactions, consumers transport the product off the reservation, and in delivery sales, the United States Postal Service or a common carrier transports the product off the reservation. In *Moe*, the tribal retailer benefited from highways passing by the reservation bringing off-reservation consumers to the reservation smokeshop. In this case, Petitioner benefits from the information superhighway (i.e. the Internet) attracting consumers to his reservation business. The material facts for face-to-face sales and delivery sales are the same and warrant the same analysis under *Wagnon* and *Bracker*.

CONCLUSION

Congress has plenary power to regulate Indian commerce. *Cotton*, 490 U.S. at 192. It has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220-21. Recently, Congress enacted the Native American Business Development, Trade Promotion and Tourism Act, codified at 25 U.S.C. § 4301 *et seq.* In this Act, Congress stated:

> [T]he twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available[,] to address the challenges faced by those groups . . .the resources of the private market . . . [and] by encouraging the formation of new businesses . . . and the expansion of existing businesses[,] and . . . facilitating the movement of goods to and from Indian lands . . .

25 U.S.C. § 4301 (a)(12)-(b)(1)(B).

Earlier this year, Congress enacted the PACT Act to regulate the distribution, sale and use of cigarettes in the United States. Although the PACT Act requires state, local and tribal taxes to be collected prior to any retail sale, Congress did not sanction any State law enacted for the avowed purpose of "effectively and fully neutraliz[ing]" the playing field between large and small tobacco manufacturers in a national, free market open for competition. Importantly, Congress specifically

stated the PACT Act should not be construed to amend, modify, or otherwise effect:

> any limitation under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country [or] . . . any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the United States in trust for one or more Indian tribes . . . .

Pub. L. No. 111-154, § 5, 124 Stat. at 1110.

The record in this case contains an "Information Report on Internet Cigarette Sales" prepared by Philip Morris USA, Inc. In that report, Philip Morris observes:

> Native American Internet sites extend their retail customer base from adjacent non-tribal customers to customers around the Nation . . . . A key distinction between Native American and non-Native American sites is that Native American sites use the Internet to gain a broad geographic reach for brands they manufacture. Some examples of

> Native American-manufactured brands include Seneca, Native and Sky-dancer.

Clearly, Philip Morris views these Native businesses as its competitors. In a national market, Philip Morris may freely use its resources to compete with such Native American businesses. However, Idaho and other Settling States have no business picking favorites or fixing the market by restraining free trade through their laws. Such *ultra vires* laws, in any case, exceed "the regulatory sphere traditionally occupied by . . . the States" for the health, safety and welfare of its citizens and are subject to constitutional challenges. *Cf. Tracy*, 519 U.S. at 313.

Petitioner Maybee is one, among hundreds of tobacco dealers, licensed and authorized by tribal governments to sell tobacco products from their tribal territories. These Native American tobacco dealers include importers, manufacturers, distributors and retailers, offering a wide variety of tobacco products for sale nationwide. These Native American businesses are accorded by Congress and the Constitution the right to "have free access to every market in the Nation," to have their goods exported from their tribal lands and to have "no foreign state . . . by customs, duties or regulations exclude them" from local markets. *Hood*, 336 U.S. at 539. Petitioner and other Native American tobacco dealers need to know whether they can constitutionally be subject to such state laws so, in the words of Oliver Wendall Holmes, they "know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves."

For these reasons, Petitioner respectfully requests this Court grant his Petition for Certiorari.

Respectfully submitted,

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Dated: June 1, 2010

148 Idaho 520

Supreme Court of Idaho.
Boise, November 2009 Term.
STATE of Idaho, by and through Lawrence G. WASDEN, Attorney General, Plaintiff-Respondent,
v.
Scott B. MAYBEE, d/b/a SmartSmoker.Com, BuycheapCigarettes.Com and OrderSmokesdirect.Com, Defendant-Appellant.
No. 35200.

Jan. 15, 2010.

Stoel Rives, LLP, Boise, for appellant. J. Walter Sinclair argued. Margaret Murphy, Buffalo, New York, argued.

Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondent. Brett T. DeLange argued.

BURDICK, Justice.

Scott B. Maybee challenges the district court's grant of summary judgment in favor of the State of Idaho. Maybee argues that Idaho's Tobacco Master Settlement Agreement Complementary Act (Complementary Act) is inapplicable to his conduct, as the Complementary Act was not intended to regulate unstamped cigarettes sold in interstate commerce. Maybee also contends that the Complementary Act is preempted as it applies to him, under both the Interstate Commerce Clause and the Indian Commerce Clause of the U.S. Constitution, as Maybee is a Native American, living and conducting business upon a reservation located in the state of New York.

Maybee argues that the tobacco permit requirement of Idaho's Prevention of Minors' Access to Tobacco Act (MAA) is likewise preempted by the Indian Commerce Clause.

I. STATUTORY BACKGROUND

On November 23, 1998, the four largest tobacco product manufacturers in the United States entered into the Master Settlement Agreement (MSA) with 46 states, including Idaho. The MSA arose out of litigation between the states and tobacco companies concerning responsibility for the costs associated with the treatment of tobacco-related health conditions. *See* MSA (November 23, 1998), http://www2.idaho.gov/ag/consumer/tobacco/MSA.pdf. In addition to requiring changes in advertising and marketing practices the MSA "obligates these manufacturers, in return for a release of past, present and certain future claims against them . . . to pay substantial sums to the state (tied in part to their volume of sales.)" I.C. § 39-7801(e). Under the terms of the MSA, each participating state is required to enact and enforce a "qualifying statute" that "effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers[[1]] experience vis-à-vis Non-Participating

[1] As used throughout this opinion, "Participating Manufacturer(s)" refers to those tobacco product manufacturers who have bound themselves to comply with the MSA, either as original signatories or as subsequent adopters. "Non-Participating

(Continued on following page)

Manufacturers within such Settling State as a result of the provisions of [the MSA]." MSA at 52; *see* I.C. § 39-7801(f). If Participating Manufacturers can prove that their market share in a given state has decreased as a result of the MSA, and that the state has not diligently enforced its "qualifying statute," then Participating Manufacturers are entitled to a Non-Participating Manufacturer Adjustment (NPM Adjustment). MSA at 47-59. An NPM Adjustment is a reduction in scheduled payments under the MSA, and results in states having fewer funds available to cover medical costs incurred as a result of tobacco-related health issues. *See id.*

In an attempt to comply with the MSA's requirements, Idaho passed the Master Settlement Agreement Act (MSAA), codified at I.C. §§ 39-7801 to 7803. The MSAA requires tobacco manufacturers to either: (1) join the MSA as signatories, whereupon they will be required to make payments to the State in accordance with the MSA schedule, or (2) make payments into a qualified escrow account in accordance with I.C. § 39-7803(b)(1). Following passage of the MSAA, the Idaho Legislature determined that cigarettes produced by Non-Participating Manufacturers were being sold in Idaho, without qualified escrow payments being made, and that additional measures were necessary to ensure compliance with the MSAA.

Manufacturer(s)" refers to those tobacco product manufacturers who are not signatories, nor adopters of the MSA.

As a result, the Complementary Act was passed in 2003.

In the findings and purpose of the Complementary Act, I.C. § 39-8401, the legislature determined that:

> [V]iolations of Idaho's tobacco master settlement agreement act threaten the integrity of Idaho's master settlement agreement with leading tobacco product manufacturers, the fiscal soundness of the state, and the public health. The legislature finds that enacting procedural enhancements will help prevent violations of Idaho's tobacco master settlement agreement act and thereby safeguard the master settlement agreement, the fiscal soundness of the state and the public health.

As such, the goal of the Complementary Act was to prevent end-runs around the fee requirements of the MSA and the escrow requirement of the MSAA, through the sale of cigarettes produced by Non-Participating Manufacturers, who were not paying fees in accordance with the MSA, and were not making escrow payments in accordance with the MSAA. The State was seeking to protect the scheduled fee payments under the MSA, and ensure that appropriate escrow funds are available to the State when needed to pay for medical expenses incurred due to tobacco-related health conditions, thereby protecting the public health.

Pursuant to this goal, I.C. § 39-8403(1) requires all tobacco product manufacturers whose products are

sold in Idaho to provide Idaho's attorney general with an annual certification that the manufacturer is either a signatory to the MSA or is fully complying with the escrow requirements of the MSAA. Idaho Code § 39-8403(2) directs the Idaho attorney general to develop and publish the Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho Directory), listing all tobacco product manufacturers who have met their obligations under I.C. § 39-8403(1) of the Complementary Act.[2] *See* Idaho Directory (October 5, 2009), http://www2.state.id.us/ag/consumer/tobacco/manufacturer-directory.htm. Idaho Code § 39-8403(3) makes it unlawful for any person:

> (b) To sell, offer or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory; (c) To acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of this subsection (3).

Idaho has been particularly concerned with the influence and effects of tobacco products on children and young adults, and in an effort to help prevent

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[2] As used throughout this opinion, "Noncompliant Manufacturer(s)" refers to those Non-Participating Manufacturers who have not met their escrow obligations under the MSAA, and therefore are not included on Idaho's Directory of Compliant Tobacco Product Manufacturers and Brand Families. "Noncompliant Cigarettes" refers to cigarettes produced by Noncompliant Manufacturers.

future tobacco-related health conditions, the legislature passed the MAA in 1998. I.C. § 39-5701 *et seq.* In the legislative findings and intent of the MAA the legislature noted that decreasing tobacco use amongst Idaho's minors (estimated at that time to be at least 27%) was a State goal, related to the promotion of the general health and welfare. I.C. § 39-5701. The legislature further found tobacco to be a "gateway drug," with children who use tobacco being far more likely to use other illegal substances, including alcohol, marijuana, and cocaine. *Id.* Finally, the legislature determined that:

> Tobacco is the number one killer in Idaho causing more deaths by far than alcohol, illegal drugs, car crashes, homicides, suicides, fires and AIDS combined. According to the center for disease control and prevention (CDC), twenty-four thousand three hundred ninety-four (24,394) children in Idaho currently under eighteen (18) years of age will die prematurely from tobacco-related disease. Tobacco costs the state over two hundred forty million dollars ($240,000,000) each year and is the single most preventable cause of death and disability in Idaho.

Id. The legislature passed the MAA in an effort to prevent minors from accessing tobacco products, in part by regulating who is authorized to sell tobacco. Idaho Code § 39-5704(1) states that it "shall be unlawful to sell or distribute or offer tobacco products for sale or distribution at retail or to possess tobacco products with the intention of selling at retail

without having first obtained a tobacco permit from the department which shall be the only retail tobacco permit or license required."

Once again, after several years the legislature determined that the MAA was not entirely effective in accomplishing its goal, and additional measures were required to shore up the act. In 2003, the MAA was amended, with minor changes to I.C. §§ 39-5702 and 5710, and the addition of I.C. §§ 39-5714 to 5718. The statement of purpose accompanying the house bill that was later passed as the 2003 amendment, states:

> Over the past several years, the State of Idaho has been a leader in preventing youth access to tobacco products. With the rise of tobacco sales via the internet and other direct sales means, a hole in existing Idaho law has surfaced. This legislation would stop a delivery sale of tobacco products to any individual who is under the legal minimum purchase age in Idaho.

H.B. 357, RS 13148, 57th Leg., Reg. Sess. (Idaho 2003), *available at* http://www3.state.id.us/oasis/2003/H0357.html#sop. The pertinent changes brought about by the 2003 amendment are as follows: I.C. § 39-5718 requires all delivery sellers to obtain a tobacco permit, and to provide the State with regular information regarding all delivery sales; I.C. § 39-5714 forbids tobacco permit holders from making delivery sales to minors; I.C. § 39-5716 requires delivery sellers to include specific language concerning health risks and taxes on all advertisements or websites;

and I.C. § 39-5717 requires that each delivery sales order include a document with the following language: "TOBACCO PRODUCTS: IDAHO LAW PROHIBITS SHIPPING TO INDIVIDUALS UNDER THE AGE OF EIGHTEEN YEARS, AND REQUIRES THE PAYMENT OF TAXES PURSUANT TO CHAPTER 25, TITLE 63, IDAHO CODE. PERSONS VIOLATING THIS MAY BE CIVILLY AND CRIMINALLY LIABLE."

II. FACTUAL AND PROCEDURAL BACKGROUND

Maybee is a Native American member of the Seneca Nation of Indians and resides on an Indian reservation located in western New York. As the sole proprietor of the websites smartsmoker.com, ordersmokesdirect.com, and buycheapcigarettes.com, Maybee has sold over 2,500,000 cigarettes from brands not listed on the Idaho Directory to consumers located within Idaho. Maybee does not possess an Idaho tobacco permit.

On August 21, 2006, an Idaho deputy attorney general wrote a letter to Maybee, advising Maybee of Idaho's tobacco laws and Maybee's apparent violation of those laws, and requesting that Maybee desist in his unlawful conduct. On September 22, 2006, the State filed a Verified Complaint against Maybee with the district court, alleging violations of the Complementary Act and the MAA. Maybee failed to respond to the Complaint and the State obtained a Default

Judgment on November 12, 2006. Pursuant to a motion filed by Maybee, the district court set aside the default judgment on January 19, 2007.

On June 19, 2007, the State moved for summary judgment, and on August 21, 2007, Maybee made a cross-motion for summary judgment. A summary judgment hearing was held before the district court on September 18, 2007, and on October 31, 2007, the district court issued its Memorandum Decision and Order finding that the State was entitled to summary judgment.

First, the district court held that the cigarette sales in question took place in Idaho for purposes of the Complementary Act. The court then found that Maybee was judicially estopped from claiming that the sales took place in New York, as Maybee had previously submitted an affidavit in a New York case representing that his internet sales took place in the purchasers' home states. The court also noted that the Idaho Uniform Commercial Code (IUCC) was likely inapplicable to the Complementary Act, as far as determining where the cigarette sales took place. Second, the court held that Maybee's arguments concerning preemption under the Indian Traders Act was clearly misplaced as the Act clearly regulated only sales *to* Native Americans, not sales *from* Native Americans. Third, the court found that the Indian Commerce Clause did not preempt application of the MAA to Maybee (this ruling was possibly extended to the Complementary Act as well. On this point the Memorandum Decision and Order is unclear). Fourth,

the court found that the Complementary Act, as applied to Maybee, was not preempted by the Interstate Commerce Clause.

Maybee filed a Motion for Reconsideration on December 17, 2007, based in part upon his "corrected" affidavit in the New York case that had been relied upon by the district court in finding Maybee judicially estopped from claiming that his sales occurred in New York and not Idaho. On February 26, 2008, the district court issued its second Memorandum Decision and Order denying Maybee's motion on the grounds that amending the affidavit from the New York case did not change the finding of judicial estoppel, and reiterating that, in the alternative, the IUCC was not controlling on the issue of situs of sales for purposes of the Complementary Act. Also on February 26, 2008, the district court entered a Judgment, enjoining Maybee from selling cigarettes not listed on the Idaho Directory to parties within Idaho, or importing Noncompliant Cigarettes into the state of Idaho. The Judgment further enjoined Maybee from selling any tobacco products in Idaho, or possessing them for retail in Idaho, without first obtaining the tobacco permit mandated by the MAA. Finally, the district court awarded the State civil penalties of $163,225, as well as costs and attorney fees pursuant to I.C. § 39-8407(5).

On April 8, 2008, Maybee filed his Notice of Appeal to this Court. We now affirm.

III. STANDARD OF REVIEW

"On appeal from the grant of a motion for summary judgment, this Court's standard of review is the same as the standard used by the district court originally ruling on the motion." *Boise Tower Assoc., LLC v. Hogland,* 147 Idaho 774, 779, 215 P.3d 494, 499 (2009). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). If the evidence presented shows no disputed issues of material fact, then all that remains are questions of law, over which this Court exercises free review. *Mendenhall v. Aldous,* 146 Idaho 434, 436, 196 P.3d 352, 354 (2008). "The Supreme Court exercises free review over issues of statutory interpretation." *Taylor v. Maile,* 146 Idaho 705, 711, 201 P.3d 1282, 1288 (2009).

IV. ANALYSIS

The facts are not in dispute, having been stipulated to by the parties. This Court must determine four issues. First, whether the Complementary Act is intended to regulate interstate sales, and whether Maybee sells cigarettes or offers cigarettes for sale within Idaho. Second, whether the Complementary Act, as applied to interstate delivery sellers, is preempted by the Interstate Commerce Clause. Third, whether the Complementary Act and the MAA, as

applied to Maybee, are preempted by the Indian Commerce Clause. Fourth, whether the State is entitled to attorney fees on appeal. We shall address these issues in turn.

A. The Complementary Act is intended to govern interstate as well as intrastate sales of cigarettes to consumers in the state of Idaho, and Maybee sells cigarettes in Idaho.

The goal of the Idaho Legislature in enacting the Complementary Act was to prevent the sale of cigarettes made by any Noncompliant Manufacturer. Maybee, as a matter of uncontested fact, has sold over 2,500,000 cigarettes (as defined under the MSAA and Complementary Act) produced by Noncompliant Manufacturers to Idaho consumers.

1. The Complementary Act regulates cigarettes, as defined by the MSAA, not merely "units sold."

Maybee acknowledges that he has sold unstamped cigarettes, not listed on the Idaho Directory, through interstate commerce, to Idaho consumers. Nevertheless, Maybee contends that he is not subject to the Complementary Act's restrictions, as the Complementary Act and the MSAA must be interpreted *in pari materia*, and therefore those Acts regulate not "cigarettes" but "units sold." Maybee cites to the statement of purpose for House Bill 111, which later

became the Complementary Act. That statement of purpose reads:

> This proposed legislation is designed to be complementary legislation to Idaho's Tobacco Master Settlement Agreement Act ("the Act"). Under Idaho's Master Settlement Agreement with the tobacco industry, Idaho must diligently enforce the Act. A number of tobacco product manufacturers are not complying with the provisions of the Act. Many of the non-compliant manufacturers are located in foreign countries. Effecting compliance is in some cases quite difficult because of their location. Requiring cigarette distributors to only stamp and distribute cigarettes of tobacco product manufacturers that are in compliance with the Act, and establishing procedures and remedies to ensure that the Act's provisions will be followed will significantly improve compliance under, and assist Idaho with its duty of enforcing, the Act.

H.B. 111, RS 12609, 57th Leg., Reg. Sess. (Idaho 2003), *available at* http://www3.state.id.us/oasis/2003/H0111.html. Maybee argues that, because the MSAA only requires Non-Participating Manufacturers to make escrow payments for "units sold," (such definition not including cigarettes that do not bear an Idaho tax stamp) the Complementary Act should also be read as regulating "units sold" rather than all cigarettes. Maybee contends that the regulation of "units sold" is all that is required for the State to meet its obligations of diligently enforcing

the MSAA, as required by the MSA, and that therefore the State is not at risk of an NPM Adjustment under the MSA.

The basic rules of statutory construction were summarized by this Court in *City of Sandpoint v. Sandpoint Independent Highway District*:

> The interpretation of a statute is a question of law over which we exercise free review. It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. A statute is ambiguous where the language is capable of more than one reasonable construction. If the statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history. Statu[t]es that are in pari materia must be construed together to effect legislative intent. Statutes are in pari materia if they relate to the same subject.

139 Idaho 65, 69, 72 P.3d 905, 909 (2003) (internal citations omitted). "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as

to determine the legislature's intent." *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002) (internal quotation marks omitted) (quoting *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.3d 1299, 1302 (1992)). "Constructions that would lead to absurd or unreasonably harsh results are disfavored." *In re Daniel W.*, 145 Idaho 677, 680, 183 P.3d 765, 768 (2008).

The words of the Complementary Act, given their plain, usual and ordinary meaning, are unambiguous, and are not in conflict with any provision of the MSAA. Idaho Code § 39-8402(2) provides that "cigarette" has the same meaning under the Complementary Act as it has under the MSAA, defined at I.C. § 39-7802(d).[3] The definition of cigarette makes no

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[3] "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," nine one-hundredths (0.09) ounces of "roll-your-own" tobacco shall constitute one (1) individual "cigarette."

reference to tax stamps, or units sold, and is quite broad in scope. Having incorporated this definition, I.C. § 39-8403(3) states:

> I.C. § 39-7802(d).
>
> It shall be unlawful for any person: (a) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory; (b) To sell, offer or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory; (c) To acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of this subsection (3).
>
> The plain meaning of this statute is, *inter alia*, that it is illegal to sell, offer, or possess for sale Noncompliant Cigarettes, within Idaho.

It is worth noting that under Maybee's proposed interpretation, an absurdity would result. Idaho Code § 39-8403(3)(a) mandates that no stamps be affixed to cigarettes manufactured by Noncompliant Manufacturers. If we were to accept Maybee's proposed interpretation of "cigarettes" under the Complementary Act as meaning "units sold," then I.C. § 39-8403(3)(a) is mandating that one may not affix a tax stamp to a Noncompliant Cigarette, and since unstamped cigarettes are not considered cigarettes, this in-effect

means that one may not affix a stamp to a stamped cigarette.

We hold that the Complementary Act clearly prohibits selling, or offering for sale, Noncompliant Cigarettes, in Idaho.

2. *The Complementary Act applies to interstate "delivery" sellers as well as to intrastate sellers.*

Maybee next argues that the Complementary Act, read *in pari materia* with the MSAA, is applicable only to intrastate sales of cigarettes in Idaho. In summary, this argument is as follows: (1) the State's sole purpose in enacting the Complementary Act was to prevent an NPM Adjustment in the scheduled payments to the State from the Participating Manufacturers under the MSA; (2) the State has no obligation to regulate the sale of unstamped cigarettes within Idaho under the MSAA (the qualifying statute enacted in accordance with the MSA), and so would not face an NPM Adjustment by allowing interstate sales of Noncompliant Cigarettes; (3) out-of-state delivery sellers have no substantial nexus to the state and therefore cannot be required to collect or remit taxes on goods sold in interstate commerce to Idaho consumers, as such, these sellers do not have to stamp their cigarettes; and (4) the State therefore had no intention of regulating the conduct of interstate sellers selling unstamped cigarettes in Idaho.

The logical flaws in this argument are apparent. First, as stated above, the plain language of the Complementary Act demonstrates a legislative intent to regulate the sale of all cigarettes, not only stamped cigarettes, whereas the MSAA regulates only stamped cigarettes ("units sold"). Second, under Maybee's proposed interpretation, Non-Participating Manufacturers based outside of Idaho could avoid their escrow obligations altogether by simply selling their cigarettes directly to Idaho consumers through the mail, or through an out-of-state retailer who would sell directly to Idaho consumers through the mail, rather than through in-state wholesalers and retailers. Such a result would violate not only the spirit of the MSA, but also Idaho public policy, and would be detrimental to the fiscal soundness of the State. Third, this argument glosses over the fact that, possible NPM Adjustments aside, Non-Participating Manufacturers that do not comply with the MSAA's escrow requirements deprive the State of financial assets, which are needed to defray medical care costs that have arisen as a result of tobacco-related health issues.

"Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedent[t] at the time the statute was passed." *Druffel v. State, Dep't. of Transp.*, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002).

i. The Complementary Act & Idaho Code § 63-2508

The Complementary Act provides that it shall be unlawful for any person "[t]o affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory." I.C. § 39-8403(3)(a). Idaho Code § 63-2508 provides that:

> No cigarettes may be purchased, sold, distributed, stored or held on hand or in possession of any person *without Idaho stamps having been affixed thereto,* within a reasonable time after receipt thereof. No person may import cigarettes, nor hold or have in possession *unstamped cigarettes,* unless he shall have qualified under this act as a wholesaler and obtained a permit, as provided for in section 63-2503, Idaho Code.

(Emphasis added). Idaho Code § 63-2508 was enacted in 1974, and amended in 1986, long before the Complementary Act was enacted in 2003. *See* S.L.1986, ch. 193, § 5. When the legislature forbade the stamping of Noncompliant Cigarettes in I.C. § 39-8403(a), they did so with the knowledge that I.C. § 63-2508 broadly restricts the legality of possessing unstamped cigarettes within the state.

ii. The Complementary Act & the MAA

In 2003, the legislature amended the MAA, seeking to strengthen existing Idaho tobacco statutes,

as they pertain to internet and delivery sellers. Under this amendment, Idaho Code § 39-5702(2) defines a "[d]elivery sale" as:

> [T]o distribute tobacco products to a consumer in a state where either: (a) the individual submits the order for such sale by means of a telephonic or other method of voice transmission, data transfer via computer networks, including the internet and other online services, or facsimile, or the mails; or (b) the tobacco products are delivered by use of the mails or a delivery service.

From the stipulated and uncontested facts of this case, it is clear, as a matter of law, that Maybee is engaged in delivery sales. Idaho Code § 39-5714 addresses "[r]equirements for delivery sales," providing in I.C. § 39-5714(2):

> Each permittee taking a delivery sale order shall comply with . . . *all other laws of the state of Idaho generally applicable to sales of tobacco products* that occur entirely within Idaho including, but not limited to, those laws imposing excise taxes, sales and use taxes, licensing and tax stamping requirements and escrow or other payment obligations.[4]

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[4] Idaho Code § 39-5704 requires all persons to acquire a tobacco permit prior to selling tobacco, offering tobacco for sale, possessing tobacco with the intent to sell, or distributing tobacco

(Continued on following page)

(Emphasis added). This is an unambiguous requirement that all delivery sellers shall be treated the same as in state face-to-face sellers under the law. The plain language provides for no other reasonable interpretation.

3. The Idaho Uniform Commercial Code is not determinative of the situs of sales for purposes of application of the Complementary Act; Maybee sold Noncompliant Cigarettes in Idaho.

Maybee next contends that he does not sell, or offer for sale, Noncompliant Cigarettes in Idaho. The provision of the Complementary Act that Maybee was sued under, I.C. § 39-8403(3)(b), prohibits anyone from selling, offering for sale, or possessing for sale in Idaho, Noncompliant Cigarettes. Maybee contends that the Uniform Commercial Code, as adopted by the Idaho Legislature, should be considered dispositive in determining where Maybee's sales take place for purposes of the Complementary Act. He also asserts that under the IUCC Maybee's sales take place in New York, and that therefore his conduct is not subject to regulation by the Complementary Act. The State responds that the official comment to I.C. § 28-2-401(2)(a) makes it clear that the IUCC's

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at retail. So although I.C. § 39-5714(2) is phrased in terms of "permittees" this is because these delivery sales are flatly forbidden by those not holding permits. This Court will address the permit requirement in more detail later in this opinion.

determination of the situs of sale, or transfer of title, is not controlling in determining whether a public regulation applies to a given transaction, and that Maybee is judicially estopped from arguing that his sales did not take place in Idaho.[6]

The relevant portion of the IUCC reads as follows:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but (b) if the contract requires delivery at destination, title passes on tender there.

I.C. § 28-2-401(2). Section one of the Official Comments to I.C. § 28-2-401 states "[t]his section,

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[6] "[T]he party asserting judicial estoppel must show that the sworn statement at issue was used to obtain a judgment, advantage, or consideration from another party." *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 749, 215 P.3d 457, 469 (2069). The State's judicial estoppel claim fails on appeal as they failed to meet this burden.

however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of 'public' regulation depends upon a 'sale' or upon location of 'title' without further definition."

The goal of the legislature in enacting I.C. § 39-8403(3) of the Complementary Act was to prevent the cigarettes of Noncompliant Manufacturers from being sold to Idaho consumers. Idaho Code § 39-8403(3) is concerned with the introduction of Noncompliant Cigarettes into Idaho, not where the legal title to those cigarettes passes. Therefore, we hold that the Uniform Commercial Code is irrelevant to the determination of where Maybee's cigarette sales took place, and that those cigarette sales did, in fact, take place in Idaho for purposes of the Complementary Act.

B. The Interstate Commerce Clause of the United States Constitution does not preempt the Complementary Act as it applies to Maybee.

The next argument put forth by Maybee is that if the Complementary Act is interpreted as regulating interstate, as well as intrastate, sales, it is in conflict with the Interstate Commerce Clause of the United States Constitution.

Article I, Section 8, clause 3 of the United States Constitution is the basis for what is commonly termed the Interstate Commerce Clause, granting

Congress the power "[t]o regulate commerce . . . among the several states. . . ." In addition to providing Congress with the authority to regulate commerce between states, this clause has long been interpreted as implicitly containing a negative or dormant restraint, preempting state regulations that would interfere with the free-flow of interstate commerce, even where the state regulations do not conflict with existing federal regulation. *United Haulers, Ass'n, v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338, 127 S.Ct. 1786, 1792, 167 L.Ed.2d 655, 664 (2007). There are three ways in which a state statute may be found to be in violation of the dormant Commerce Clause.

First, it may facially discriminate. As summarized by the United States Supreme Court in *United Haulers*, a state law is *per se* unconstitutional if "it discriminates on its face against interstate commerce. In this context, '"discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* (internal citations omitted) (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13, 21 (1994)). Second, the burdens a statute places upon commerce may outweigh its local benefits. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the

putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970). Third, a statute may attempt to regulate conduct occurring entirely outside the state. In *Healy v. Beer Institute, Inc.*, the Supreme Court held that:

> First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43[, 102 S.Ct. 2629, 2641, 73 L.Ed.2d 269, 283] (1982) (plurality opinion). . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

491 U.S. 324, 336, 109 S.Ct. 2491, 2499, 105 L.Ed.2d 275, 288 (1989).

The Complementary Act does not facially discriminate against interstate commerce. As is relevant here, it prohibits both intrastate and interstate parties from selling, or offering for sale, Noncompliant Cigarettes in Idaho. *See* I.C. § 39-8403(3). This regulation does not benefit in-state economic interests at the expense of out-of-state economic interests; all sellers are treated equally regardless of their location.

The burdens upon interstate commerce do not outweigh the local benefits of the Complementary Act's regulation. As discussed above, the State's interest in regulating sales of Noncompliant Cigarettes is to ensure adequate funds to provide medical care for citizens who have developed tobacco-related health problems. This is unquestionably a legitimate public purpose, and any impact it has upon interstate commerce is plainly incidental. Finally, the commerce regulated here does not occur wholly outside the boundaries of the State; if it did the Complementary Act, as interpreted, would not apply.

In the case of *Freedom Holdings, Inc. v. Spitzer,* 357 F.3d 205 (2nd Cir.2004), the Second Circuit Court of Appeals considered whether New York's so-called "Contraband Statutes" violated the dormant Commerce Clause. These Contraband Statutes are very similar to the provision of the Complementary Act at dispute here, and were passed in response to New York's signing of the MSA. *See id.* at 215. The Contraband Statutes forbid the tax-stamping of Noncompliant Cigarettes, and forbid the selling of unstamped cigarettes in New York. *Id.* The court in *Freedom Holdings* examined the three types of possible violations to the commerce clause and rejected them all. *Id.* at 216-22.

There is no evidence that Idaho's Complementary Act treats interstate sellers any differently from intrastate sellers, that the burdens on interstate commerce outweigh the local benefits, nor that the Act is attempting to regulate activities occurring

entirely outside of Idaho. Therefore, we hold that the Complementary Act, as interpreted, is not preempted by the Interstate Commerce Clause.

C. The Indian Commerce Clause of the United States Constitution does not preempt the Complementary Act and the MAA, as they apply to Maybee.

Maybee next contends that the Complementary Act and the MAA, as applied to an on-reservation tribal member, are preempted by the Indian Commerce Clause of the United States Constitution. The State argues that, as far as it concerns the Complementary Act, this argument should not be considered because it is raised for the first time on appeal. In the alternative, the State argues that neither the Complementary Act nor the MAA conflict with the Indian Commerce Clause.

1. Waiver

The State asserts that, in argument before the district court, "[Maybee] contended only that the Indian trader statutes, 25 U.S.C. § 261-265, preempted the Complementary Act. . . . His vacillating preemption theories procedurally default his preemption claim as to the Complementary Act."

"An issue raised for the first time on appeal will not be considered by this Court." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 310, 160 P.3d 743, 749 (2007). However, where one party

presents an issue to the trial court, it is addressed by the trial court, and it is raised and fully briefed on appeal, the issue may properly be heard by this Court. *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 357, 787 P.2d 1159, 1165 (1990).

The transcript of the summary judgment hearing held before the district court on September 18, 2007, reveals that the State argued this issue before the district court:

> Defendant has raised two Indian law arguments that I want to quickly respond to with *respect to the Complementary Act*. One of them is that the Indian Commerce Clause prohibits this. And that's just not true. The U.S. Supreme Court has said there's no dormant sort of provision to the Indian Commerce Clause. It's just an authority for the congress to enact legislation.

In the district court's first Memorandum Decision and Order, the court ruled on the applicability of the Indian Commerce Clause as follows: "The Indian Commerce Clause, Article 1, § 8 of the United States Constitution, and the Indian Traders Act, 25 U.S.C. § 261, do not support Maybee's position here." It is unclear whether the court was addressing the Indian Commerce Clause in respect to only the MAA or to both the MAA and the Complementary Act.

The State raised the issue in its argument before the district court, and the district court, at least

arguably, addressed the issue in its first Memorandum Decision and Order. Also, both parties have fully briefed this issue before this Court. Therefore, this Court finds that Maybee's argument, that the Indian Commerce Clause preempts application of the Complementary Act to Maybee, was not waived.

2. Preemption

Maybee contends that, in seeking to apply the Complementary Act and the MAA to Maybee, the State of Idaho is attempting to regulate a tribal member's on-reservation activity, and that this automatically raises the issue of federal preemption under the Indian Commerce Clause.

The Indian Commerce Clause arises from the same constitutional text as the Interstate Commerce Clause; Article I, Section 8, clause 3, of the United States Constitution grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes." In *Cotton Petroleum Corp. v. New Mexico*, the United States Supreme Court pointed out the key difference between applications of the Interstate Commerce Clause and the Indian Commerce Clause:

> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to

> provide Congress with plenary power to legislate in the field of Indian affairs. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. . . . [T]he fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdiction to trade "with" Indian tribes.

490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209, 237 (1989) (internal citations omitted).

In *White Mountain Apache Tribe v. Bracker,* the Supreme Court noted that traditionally a sense of tribal self-government and limited autonomy has provided the backdrop for deciding cases under the Indian Commerce Clause. 448 U.S. 136, 142-43, 100 S.Ct. 2578, 2583-84, 65 L.Ed.2d 665, 671-72 (1980). The semi-independent position of the Indian tribes, coupled with the power of Congress to regulate tribal affairs has caused the Supreme Court to find that there are two ways in which State regulation over tribal reservations and members can violate the Indian Commerce Clause. *Id.* at 142, 100 S.Ct. at 2583, 65 L.Ed.2d at 672. "First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe 'on the right of reservation

Indians to make their own laws and be ruled by them.'" *Id.* (internal citations omitted) (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251, 254 (1959)).

An express congressional statement does not have to be made in order for a state law to be preempted under the Indian Commerce Clause; however, before a state regulation is preempted, the regulatory interests of the state should be given consideration, "and 'automatic exemptions "as a matter of constitutional law"' are unusual." *Id.* at 144, 100 S.Ct. at 2584, 65 L.Ed.2d at 673 (quoting *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481 n. 17, 96 S.Ct. 1634, 1645 n. 17, 48 L.Ed.2d 96, 111 n. 17 (1976)).

In determining how to analyze any state statute that allegedly is in conflict with the Indian Commerce Clause, it is crucial to determine, as a preliminary inquiry: (1) whether the regulated conduct occurs on or off a reservation; (2) whether or not the party being regulated is a tribal member; and (3) if the conduct being regulated does occur on a reservation, whether State interests outside the reservation are implicated.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114, 119 (1973). Conversely, "[w]hen on-reservation conduct involving

only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144, 100 S.Ct. at 2584, 65 L.Ed.2d at 673. "When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Nevada v. Hicks*, 533 U.S. 353, 362, 121 S.Ct. 2304, 2311, 150 L.Ed.2d 398, 410 (2001). The cases that the Supreme Court has deemed the most difficult are those in which a state seeks to regulate the activities of a non-Indian engaging in activities upon a reservation; in that instance the Court employs a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145, 100 S.Ct. at 2584, 65 L.Ed.2d at 673.

In this case, both the Complementary Act and the MAA (collectively "the Acts") regulate the activities of Maybee, a member of the Seneca Nation. However, contrary to Maybee's contentions, the Acts do not regulate Maybee's on-reservation activities, but rather his off-reservation conduct of: (1) selling, and offering for sale, Noncompliant Cigarettes in Idaho; and (2) selling, and offering for sale, tobacco products in Idaho without having first obtained a tobacco permit. Whether Maybee delivers Noncompliant Cigarettes to Idaho consumers personally, or through a common carrier, this conduct is ultimately traceable to

Maybee. Idaho Code § 39-8403(3) is concerned with the introduction of Noncompliant Cigarettes into Idaho, and I.C. § 39-5704(1) is concerned with the introduction of any tobacco products into Idaho by anyone not first obtaining a tobacco permit. There is no conflicting federal law that would prevent the State of Idaho from regulating how tobacco may be sold or offered for sale in Idaho. As for whether the Acts infringe upon the sovereignty of the Seneca Nation of Indians, one case from the Supreme Judicial Court of Maine is particularly instructive on this point.

In *Department of Health and Human Services v. Maybee*, 965 A.2d 55 (Me.2009), the Court considered whether application of Maine's tobacco vendor license statute to Maybee was in violation of the Indian Commerce Clause. Maybee contended in that case, as in this case, that sales took place on reservation land, as his customer's offers to purchase were accepted by Maybee while on the reservation. *Id.* at 56. In rejecting this argument the Court held, "Maybee, as a delivery seller, engages in activity that reaches beyond the reservation when he accepts orders from and sends cigarettes to consumers who are off the reservation." *Id.* The Court went on to find that "[t]he balancing test described in [*Bracker*] and *Wagnon* is inapplicable to the present case because Maybee's interactions with consumers in Maine extend beyond the boundaries of the reservation." *Id.* at 57.

Where the regulated conduct occurs off reservation, application of the *Bracker* balancing test is

inappropriate. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110, 126 S.Ct. 676, 686, 163 L.Ed.2d 429, 442 (2005) ("We have applied the balancing test articulated in *Bracker* only where 'the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members,' on the reservation." (internal quotation omitted) (*quoting Arizona Dep't. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37, 119 S.Ct. 957, 960, 143 L.Ed.2d 27, 32 (1999))). Here, the regulated conduct occurred off-reservation, and so the *Bracker* balancing test does not apply.

This Court holds that the Acts are non-discriminatory statutes regulating the off-reservation conduct of a Native American, and as there is no conflicting federal law, the Acts are not preempted by the Indian Commerce Clause.

D. The State is entitled to attorney fees on appeal.

The State has requested attorney fees on appeal, in accordance with I.C. § 39-8407(5) of the Complementary Act, which provides, "[i]n any action brought by the attorney general to enforce this chapter, the attorney general shall be entitled to recover the costs of investigation, expert witness fees, costs of the action and reasonable attorney's fees." Maybee contends that attorney fees may not be awarded under this statute for two reasons: (1) the statute appears to allow the attorney general to recover attorney fees

regardless of the ultimate success or failure of his suit, and (2) the provision does not allow Maybee the possibility of collecting attorney fees if he is the prevailing party.

Although I.C. § 39-8407(5) does not, on its face, require the attorney general to be the prevailing party in order to recover attorneys fees and costs for actions brought in an effort to enforce the Complementary Act, we interpreted it as such. This is the first time this Court has interpreted I.C. § 39-8407(5). As noted above, rules of statutory construction dictate that a reviewing court shall not interpret a statute in a manner that leads to an absurd result, *In re Daniel W.*, 145 Idaho 677, 680, 183 P.3d 765, 768 (2008), and the legislature in drafting a statute is charged with knowledge of applicable statutory background and legal precedent. *Druffel v. State, Dep't of Transp.*, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002). This Court is unable to find a single instance in the entire history of this state, and indeed the nation, where the non-prevailing party was awarded attorney fees. To hold otherwise would encourage absurd results. For example, reading I.C. § 39-8407(5) as allowing the attorney general to recover for attorney fees regardless of whether or not the attorney general ultimately prevails would lead to an absurd result wherein the attorney general could recover attorney fees for a lawsuit he brought frivolously and litigated in bad faith. The legislature clearly could not have intended to provide the attorney general with the means to recover attorney fees for an unmeritorious lawsuit.

Therefore, we interpret Idaho Code § 39-8407(5) as only permitting the attorney general to recover attorney fees when the attorney general is the prevailing party.

As to Maybee's second contention, that the statute may not be enforced if it does not provide for the possibility of mutual recovery (i.e. that since Maybee could not recover under the statute if he were the prevailing party, the statute cannot be enforced) this argument has no basis in law. In *Gonzalez v. Thacker*, this Court interpreted I.C. § 12-120(4), as allowing recovery of attorney fees for plaintiffs in personal injury cases, but not for defendants. No. 34534, 2009 WL 129671, at *5, ___ Idaho ___ at ___, ___ P.3d ___ at ___ (Idaho Jan. 21, 2009).

As the State is the prevailing party on appeal, it is entitled to attorney fees, in accordance with Idaho Code § 39-8407(5).

V. CONCLUSION

In summary, we affirm the district court's grant of summary judgment in favor of the State, finding that: (1) the Complementary Act applies to both intrastate and interstate sellers of Noncompliant Cigarettes; (2) Maybee sold, and offered for sale, Noncompliant Cigarettes, in violation of the Complementary Act; (3) the Interstate Commerce Clause does not preempt application of the Complementary Act to Maybee; (4) Maybee sold tobacco products in Idaho without first obtaining an Idaho tobacco

permit, in contravention of the MAA; and (5) the Indian Commerce Clause does not preempt application of either the Complementary Act or the MAA to Maybee. Attorney fees and costs to the State.

Chief Justice EISMANN and Justices J. JONES, W. JONES and HORTON, concur.

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE, OF IDAHO, IN AND
FOR THE COUNTY OF ADA

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, Attorney General,

Plaintiff,

vs.

SCOTT B. MAYBEE, d/b/a SMARKSMOKER.COM, BUYCHEAPCIGARETTES.COM, and ORDERSMOKESDIRECT.COM,

Defendant.

Case No. CV-OC-0617645

MEMORANDUM DECISION AND ORDER

(Filed Oct. 31, 2007)

This case is before the Court on cross-motions for summary judgment. For the reasons that follow, both motions will be granted in part and denied in part.

FACTS AND PROCEDURAL HISTORY

Defendant Scott B. Maybee (Maybee) is an enrolled member of the Seneca Nation of Indians. From the Nation's tribal territory in western New York State, Maybee operates wholesale and retail tobacco sales businesses. Those at issue here are Internet and/or mail order retail businesses: SmartSmoker.com, OrderSmokesDirect.com, BuyCheapCigarettes.com, and/or Great Wolf Trade Mart. Idaho residents order

cigarettes from Maybee's businesses by Internet, telephone or mail. Maybee processes the orders and ships the cigarettes directly to Idaho residents by the United States Postal Service. Maybee does not collect taxes on these sales to Idaho residents; instead, he reports the sales to the Idaho State Tax Commission pursuant to the Jenkins Act, 15 U.S.C. § 375, et seq.

Because of the growing concern about the health effects and costs related to smoking, many states, including Idaho, entered into settlement agreements with members of the tobacco industry, primarily by way of what is known as the Master Settlement Agreement (MSA). In order to implement the agreement, the settling states adopted certain legislation, known as the Master Settlement Agreement Act (MSAA). Idaho's version is found at Idaho Code § 39-7801, et seq. Essentially, the MSAA requires that a tobacco manufacturer selling to consumers in Idaho either become a participating manufacturer under the MSA or place into a qualified escrow fund a certain amount per unit sold. The Idaho Attorney General maintains a list (the Directory) of participating manufacturers and manufacturers who have created qualified escrow funds. The MSAA allows the attorney general to bring a civil action on behalf of the State against any tobacco product manufacturer who fails to escrow the required funds (Idaho Code § 39-7803(3)) and against any distributor (wholesaler) or stamping agent (anyone who affixes tax stamps to individual cigarette packages) of products of a manufacturer who is not a participating manufacturer and

has no qualified escrow account; that is to say, anyone not on the attorney general's Directory. Idaho Code § 39-7804.

Subsequently, the State adopted the Master Settlement Agreement Complimentary Act (MSACA); Idaho's statute is found at Idaho Code § 39-8401. This act makes it unlawful for any person to sell, offer, or possess for sale in Idaho the products of manufacturers or brand families not included on Idaho's Directory.

Finally, Idaho has enacted the Prevention of Minors' Access to Tobacco Act (Minors' Access Act or MAA), Idaho Code § 39-5701, et seq. Under the MAA a retailer of cigarettes in Idaho must obtain a tobacco permit from the Idaho Department of Health and Welfare, and must comply with various procedures and notices designed to prevent delivery of cigarettes to minors. There is no fee for the permit. The MAA was amended to include within its scope sales of tobacco products over the Internet, known as "delivery sales." Idaho Code § 39-5702(2).

The State initiated this action against Maybee alleging that Maybee sells cigarettes of manufacturers not on the Directory and does not have a permit from the Department of Health and Welfare. It is undisputed that Maybee makes "delivery sales" to Idaho residents within the meaning of the MAA, sells at retail cigarettes of manufacturers not listed on the Directory, and does not have the required permit. On the other hand, it is undisputed that

Maybee is not a manufacturer, distributor, or stamping agent within the meaning of the MSAA. Both parties agree that there are no genuine issues of material fact, and the Court has not discerned any. Neither party requested a jury trial.

ANALYSIS

Summary judgment is appropriate only if the affidavits, depositions, admissions, and other evidence in the record demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), I.R.C.P., *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court "liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor." *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997). Where the evidentiary facts are undisputed and the court rather than a jury will be the trier of fact, "summary judgment is appropriate, despite the possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie*, 102 Idaho 515, 519, 650 P.2d 657, 661(1982).

At the outset it is important to delineate what is not an issue in this case. First, although it is unclear whether the State even claims a violation of the MSAA, it is clear that Maybee is not a manufacturer,

distributor, or stamping agent, and he is entitled to summary judgment on any of those grounds. Second, the State has not raised any issue of violation of the MAA, other than the failure to obtain the required permit. The actual issues presented are whether Maybee's sales take place in Idaho, whether the Indian Traders Act and/or the Indian Commerce Clause permits any state regulation of those sales, and whether Maybee must obtain the permit required by the MAA.

1. Location of Sales.

As noted above, it is undisputed that Maybee conducts his Internet and other businesses from the Seneca Nation and has no office or other presence in Idaho. He argues that the sales he makes to Idaho citizens are made on the reservation, and thus are not subject to regulation by the State. He cites Idaho Code § 28-2-401 for this proposition. That statute provides:

> **§ 28-2-401. Passing of title – Reservation for security – Limited application of this section**
>
> Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this

chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (section 28-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on secured transactions (chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) *if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment*, but

> (b) if the contract requires delivery at destination, title passes on tender there.
>
> (3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,
>
> (a) if the seller is to deliver a tangible document of title, title passes at the time when and the place where he delivers such documents and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document; or
>
> (b) if the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.
>
> (4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale." (emphasis added)

No "contract" appears in the record. It is doubtful whether this statute is applicable to the tobacco settlement statutes, since it applies only to the Idaho Uniform Commercial Code. *McGuire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1979). Further, the official comments to the statute state that it is not necessarily applicable to state regulatory schemes regarding "sales." This case certainly involves state regulation. Most telling, however, is Maybee's admission in other litigation that his sales take place in the states to

which the cigarettes are shipped. In *Day Wholesale, Inc. and Maybee v. State of New York*, Supreme Court, County of Erie, Index No. 2006/7668, Maybee submitted an affidavit in which he stated:

> Approximately 75% of my retail sales are to out-of-state purchasers. These sales are completed in the home state of the purchaser once their orders have been delivered through the mails. U.C.C. § 2-401. These out-of-state shipments are not intended for resale in the purchaser's home state, but are retail sales intended for the purchaser's personal use and consumption. Under the Interstate Commerce Clause of the United States Constitution, these out-of-state purchasers are exempt from the imposition of New York sales and excise taxes since both the sale and use take place outside of the State. Accord 20 N.Y.C.C.R. § 76.3.

Affidavit of Maybee's counsel, Margaret Murphy, filed August 21, 2007, Exhibit B.

It appears that Maybee obtained a favorable result in that case, although on different grounds. Murphy Affidavit, *supra*, Exhibit C. Although Ms. Murphy asserts that most of the foregoing language consists of erroneous legal conclusions from which Maybee obtained no advantage and should be disregarded, the State argues, and this Court finds, that Maybee is judicially estopped from asserting here that all of his sales take place on the Seneca reservation. One may not take a position to gain an advantage in one case and then "play fast and loose"

by taking a different position to take advantage in another case. *A & J Construction Co., Inc. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005); *McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997). Thus, the sales in question do take place in Idaho. Maybee's citation to *Smith v. U.S.R.V. Properties, LC*, 141 Idaho 795, 118 P.3d 127 (2005) is unavailing, since in *Smith* the plaintiff did not obtain a favorable ruling in the first case and conditions had changed thereafter.

There is no indication that such occurred here. All of these cases indicate that judicial estoppel applies not only to factual assertions, but also to legal positions.

2. The Indian Commerce Clause

The Indian Commerce Clause, Article I, § 8 of the United States Constitution, and the Indian Traders Act, 25 U.S.C. § 261, do not support Maybee's position here. The Act clearly regulates only sales to Indians, not sales by Indians. Maybee's argument that the State's action here may affect the prices his suppliers charge is premature, if not irrelevant. Maybee's retail sales of cigarettes whose manufacturers are not on the Directory violate the MSACA.

3. MAA Permit

As to the permit requirements of the MAA, Maybee argues that either Indian sovereignty or the Interstate Commerce Clause prohibits the imposition

of this permit. Maybee primarily relies on *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Rice v. Rehner*, 463 U.S. 713 (1983). In *Moe*, the relevant issues were whether the State of Montana could require Indian sellers of cigarettes on the reservation to collect state excise taxes, and whether it could impose a state licensing tax on such sellers. On the first issue, the court held that the state could require the collection of the tax on sales to non-Indians, reasoning that the tax was not imposed on the Indian seller but on the buyer; the seller was merely the collector. In so doing, the court noted that any other ruling would allow the non-Indian buyers to escape the tax, and that the collection of the taxes would not infringe on tribal self-government. While the present case does not itself involve the collection of taxes, Maybee argues that the MAA's permit provisions may require him to do so. Under *Moe*, Maybee would not be exempt from collection of any Idaho tax, since his sales to Idaho residents do not take place on the reservation, and even if they did, sales to non-Indians would still subject him to collection of the tax.

On the issue of licensing, the *Moe* court actually said that Montana's license tax was invalid with respect to Indians selling cigarettes on the reservation; not, as Maybee argues, that the license requirement in and of itself was invalid. The present case is distinguishable because there is no fee for an MAA permit from the Idaho Department of Health and Welfare, and thus, no tax burden on the seller; and

there is no argument that the permit requirement in any way infringes on tribal self-government.

Rice v. Rehner, *supra*, supports this interpretation. In that case an Indian trader, who was also a tribal member, challenged a California law requiring the trader to obtain a liquor license for the sale of alcohol for off-premises consumption. The court again stated that state law can apply in such situations, unless it interferes with reservation self-government or conflicts with any federal law. The court specifically referenced a balance-of-interests test considering the state, federal, and tribal interests involved, holding that there were no tribal sovereignty issues regarding sales to non-Indians and that the state had a substantial interest in preventing alcohol distribution networks over which it had no control, particularly where the conduct in question had substantial off-reservation effects.

In the present case, there is no real argument that any federal or tribal interests weigh in Maybee's favor. It is clear that the State has a considerable interest in controlling the distribution of tobacco products to minors. The MAA permit requirement is minimal. Under *Moe* and *Rice*, this requirement is applicable to Maybee.

Based on the foregoing, the State is entitled to summary judgment that Maybee can be enjoined from violating the MSACA and is subject to the permit requirement of the MAA.

IT IS SO ORDERED.

Dated this 31st day of October 2007.

/s/ Kathryn A. Sticklen
Kathryn A. Sticklen
District Judge

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IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE, OF IDAHO, IN AND
FOR THE COUNTY OF ADA

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, Attorney General, Plaintiff, vs. SCOTT B. MAYBEE, d/b/a SMARTSMOKER.COM, BUYCHEAPCIGARETTES.COM, and ORDERSMOKESDIRECT.COM, Defendant.	Case No. CV-OC-0617645 JUDGMENT (Filed Feb. 26, 2008)

Pursuant to this Court's October 31, 2007 Memorandum Decision and Order, and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Defendant Maybee is permanently enjoined from:

A. Selling, offering or possessing for sale in Idaho, cigarettes of a tobacco product manufacturer or brand family not included in the Directory; or

B. Acquiring, holding, owning, possessing transporting, importing, or causing to be

imported cigarettes that Defendant Maybee knows or should know are intended for distribution or sale in Idaho in violation of subsection A.[1]

2. Until he obtains the tobacco permit required by the Minors' Access Act from the Idaho Department of Health and Welfare, Defendant Maybee is enjoined from:

A. Selling or distributing tobacco products for sale or distribution at retail in Idaho; or

B. Possessing tobacco products with the intention of selling at retail in Idaho.

3. The provisions of paragraphs 1 and 2 are independent of each other. Compliance with one paragraph does not excuse compliance with the other paragraph.

4. Defendant Maybee shall remit to the Office of the Idaho Attorney General, as a civil penalty, the sum of $163,225.00.

5. The State of Idaho is the prevailing party entitled to costs and attorney fees upon timely

---

[1] The terms "brand family," "cigarette," and "tobacco product manufacturer," have the same meaning as these terms are defined in Idaho Code Section 39-8402. The terms "distribute," "permit" "tobacco products" have the same meaning as these terms are defined in Idaho Code Section 39-5702.

presentation of an appropriate Memorandum of Costs and Attorney Fees.

Dated this 26th day of February 2008.

/s/ Kathryn A. Sticklen
Kathryn A. Sticklen
District Judge

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IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE, OF IDAHO, IN AND
FOR THE COUNTY OF ADA

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, Attorney General, Plaintiff, vs. SCOTT B. MAYBEE, d/b/a SMARTSMOKER.COM, BUYCHEAPCIGARETTES.COM, and ORDERSMOKESDIRECT.COM, Defendant.	Case No. CV-OC-0617645 MEMORANDUM DECISION AND ORDER (Filed Feb. 26, 2008)

This case is before the Court on Defendant Scott B. Maybee's (Maybee's) motion to reconsider and Plaintiff State of Idaho's (the State's) request for entry of a money judgment for civil penalties. For the reasons that follow, Maybee's motion will be denied and the State's motion will be granted.

FACTS AND PROCEDURAL HISTORY

The State seeks an injunction and civil penalties against Maybee for violations of statutes enacted to implement the Tobacco Master Settlement Agreement (MSA). The underlying facts are set forth in the Court's Memorandum Decision and Order of October

31, 2007. In that decision the Court determined that Maybee was judicially estopped from asserting that his tobacco sales did not take place in Idaho because Maybee had filed an affidavit in litigation in New York State averring that his sales were completed in the home states of the purchasers rather than New York State, in order to avoid payment of New York State taxes on his sales. After this Court issued its October 31, 2007 decision, Maybee went back to the New York court and asked to "correct" the affidavit by removing the language regarding where the sales took place. The New York court granted the motion, apparently finding no prejudice to the opposing party in that case. Armed with that order, Maybee now moves for reconsideration of this Court's conclusion that the relevant tobacco sales take place in Idaho.

This Court has not been favored with any record as to how Maybee got the New York court to allow him to withdraw the affidavit. Regardless, the order of the New York court did not cause the affidavit filed therein to cease to exist. Maybee cannot create a genuine issue of material fact by taking inconsistent positions regarding where his sales take place. This situation is precisely what judicial estoppel was intended to avoid.

However, the Court has reviewed the arguments of the parties concerning where Maybee's sales take place. As previously noted, Maybee relies on a provision of the Uniform Commercial Code (UCC) to argue that title to the cigarettes passes in New York when the cigarettes are shipped. There is no evidence

in the record to support this contention, and it is doubtful that the UCC even applies in this instance, particularly since the tobacco settlement statutes are public health regulations. The Court reaffirms its findings that Maybee's sales take place in Idaho.

Alternatively the Prevention of Minors' Access to Tobacco Act (Minors' Access Act or MAA), Idaho Code § 39-5701, et seq., by virtue of Idaho Code § 39-5702(2), specifically includes within its scope the sale of tobacco products over the Internet, referred to as "delivery sales." Maybee does not dispute that his sales are delivery sales within the meaning of the statute. Each permittee[1] taking a delivery sale order must comply with some specific statutory requirements and must comply with "all other laws of the State of Idaho generally applicable to sales of tobacco products that occur entirely within Idaho including, but not limited to, those laws imposing excise taxes, sales and use taxes, licensing and tax stamping requirements and escrow or other payment obligations" Idaho Code § 39-5714. Based on this language, Maybee's compliance with the law is not dependent upon where the sale takes place, but is dependent only upon the taking of the delivery sale order, which Maybee indisputably does. The Master Settlement Agreement Complimentary Act (MSACA), Idaho Code § 39-8401, et seq., and specifically Idaho Code

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[1] The fact that Maybee has failed to obtain a permit does not make his sales any less subject to the provisions of the MAA.

§ 39-8403(3)(b), makes it unlawful for any person to "sell, *offer*, or possess for sale in this state," non-compliant cigarettes. (Emphasis added.) Maybee clearly falls within the application of the relevant statutes. The motion for reconsideration is denied.

The State submitted a proposed final judgment, to which Maybee objected. The Court has reviewed the proposed judgment in light of the objections, taking into account the provisions of Rule 55(a), I.R.C.P. Under that rule, the judgment should not contain any recitation of the record of prior proceedings. Therefore, although the State requested in its complaint certain findings, there is no need to include them in the judgment, since they have been made in the earlier memorandum decision and order. For the same reasons, there is no reason to incorporate into the judgment the findings requested by Maybee.

Next, Maybee objects to any injunctive relief based on the Master Settlement Agreement Complimentary Act (MSACA), Idaho Code § 398401, et seq. First, he correctly argues that such relief was not requested in the complaint. The complaint did, however, request such other and further or different relief as the Court considered appropriate. The State also requested such injunctive relief in its motion for summary judgment. In his lengthy response to that motion, Maybee did not address or object to the request for injunctive relief under the MSACA. The Court found that the State was entitled to such relief. Idaho law is clear that a court can afford all relief to which a party is entitled, even if not requested in the

pleadings. *Collins v. Parkinson*, 96 Idaho 294, 527 P.2 1252 (1974).

Idaho Code § 39-8403(3)(b), makes it unlawful for any person "To sell, offer or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory; . . . " Idaho Code § 39-8407(5) provides that any person who violates Idaho Code § 39-8403(3) also violates the Idaho Consumer Protection Act (ICPA), Idaho Code § 48-601, et seq. The ICPA clearly authorizes the attorney general to seek injunctive relief and the court to order it. See Idaho Code § 48-606(1) and Idaho 48-607(1). The State is entitled to such relief, but the judgment will reflect the language of the MSACA.

Lastly, Maybee now objects to the State's request for a $500,000.00 civil penalty, costs and attorney fees. Here again, the issue of an appropriate civil penalty was addressed in the State's motion for summary judgment, but was not discussed by Maybee or by the Court. Idaho Code § 39-8406 provides:

> **§ 39-8406. Penalties and other remedies**
>
> (1) Each stamp affixed, each sale or offer to sell, and each cigarette possessed in violation of section 39-8403(3), Idaho Code, shall constitute a separate violation. For each violation hereof, the district court may impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or five thousand dollars ($5,000) upon a

> determination of violation of section 39-8403(3), Idaho Code, or any rule adopted pursuant thereto.
>
> . . . .
>
> (4) The attorney general may seek an injunction to prevent or restrain a threatened or actual violation of section 39-8403(3), 39-8405(1) or 39-8405(4), Idaho Code, by a stamping agent and to compel the stamping agent to comply with such subsections.
>
> (5) A person who violates section 39-8403(3), Idaho Code, engages in an unfair and deceptive trade practice in violation of the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

Maybee argues that only minimal penalties are appropriate and/or that there are issues of fact as to Maybee's good faith or reasonable belief that his actions were lawful based on his attorney's advice and his compliance with federal law and this Court's October 2007 order. The State asserts that a substantial penalty is appropriate, particularly since Maybee unlawfully continued to sell cigarettes in Idaho after receiving the State's letter concerning the alleged violations, the complaint in this case, and the default judgment entered against him in November of 2006 enjoining such sales.

The Court finds that a civil penalty is warranted in this case. Although Maybee asserts that this is a case of first impression, or at least the first ruling on the issues presented, it is clear from the record that

Maybee was involved in at least one, and probably several other cases of this type. The Court is not persuaded that Maybee had a reasonable belief that the MSACA applied only to "units sold" measured by "excise taxes collected by the State on packs . . . bearing the excise tax stamp of the state." Idaho Code § 39-7802(j). Idaho Code § 39-7802(j) is part of the MSACA, which applies only to manufacturers. However, the MSACA clearly makes it unlawful for anyone to sell cigarettes of manufacturers or families not included on the directory, not "units sold." While Maybee did raise some interesting arguments regarding Indian law, this was not one of them. Maybee also continued to sell such cigarettes even after he received a default judgment assessing civil penalties and enjoining him from all sales until he obtained an MAA permit.

The Court does, however, find a $500,000.00 penalty is unwarranted. Setting the amount of the penalty is in the discretion of the Court. The State has provided information regarding the number of cigarettes sold by Maybee in violation of the MSACA, as well as various methods by which such penalty might be calculated. The Court finds it appropriate to assess a civil penalty of $163,225.00, which represents the full retail price of all of Maybee's sales in Idaho. This penalty takes all of the gain out of Maybee's failure to comply.

The State is also the prevailing party in this case and is entitled to an award of costs and attorney fees pursuant to Idaho Code § 39-8407(5), upon

presentation of a timely Memorandum of Costs and Attorney Fees. The amount of such an award will be determined at a later time.

IT IS SO ORDERED.

Dated this 26th day of February 2008.

/s/ Kathryn A. Sticklen
Kathryn A. Sticklen
District Judge

[Certificate Of Mailing Omitted In Printing]

Tobacco Master Settlement Agreement Act

I.C. § 39-7801. Findings and purpose

(a) Cigarette smoking presents serious public health concerns to the state of Idaho ("state") and to the citizens of the state. The surgeon general has determined that smoking causes lung cancer, heart disease and other serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.

(b) Cigarette smoking also presents serious financial concerns for the state. Under certain health-care programs, the state may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance.

(c) Under these programs, the state pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.

(d) It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts.

(e) On November 23, 1998, leading United States tobacco product manufacturers entered into a

settlement agreement, entitled the "Master Settlement Agreement," with the state. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present and certain future claims against them as described therein, to pay substantial sums to the state (tied in part to their volume of sales); to fund a national foundation devoted to the interests of public health; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

(f) It would be contrary to the policy of the state if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the state to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

I.C. § 39-7802. Definitions

(a) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.

(b) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns," "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent (10%) or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.

(c) "Allocable share" means allocable share as that term is defined in the Master Settlement Agreement.

(d) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains: (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For

purposes of this definition of "cigarette," nine one-hundredths (0.09) ounces of "roll-your-own" tobacco shall constitute one (1) individual "cigarette."

(e) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

(f) "Qualified escrow fund" means an escrow arrangement with a federally or state-chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars ($1,000,000,000) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing or directing the use of the funds' principal except as consistent with section 39-7803, Idaho Code.

(g) "Released claims" means released claims as that term is defined in the Master Settlement Agreement.

(h) "Releasing parties" means releasing parties as that term is defined in the Master Settlement Agreement.

(i) "Tobacco product manufacturer" means an entity that after the date of enactment of this act directly (and not exclusively through any affiliate):

(1) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United

States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsections II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(2) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(3) Becomes a successor of an entity described in paragraph (1) or (2) of this subsection.

The term "tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of paragraphs (1) through (3) of this subsection.

(j) "Units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the state on packs (or "roll-your-own" tobacco containers) bearing the excise

tax stamp of the state or on unstamped "roll-your-own" tobacco containers, with each nine one-hundredths (0.09) ounces of "roll-your-own" tobacco equaling one (1) unit sold. The state tax commission shall promulgate such rules as are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

I.C. § 39-7803. Requirements

<Section effective until proclamation by governor.>

Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after the date of enactment of this act shall do one (1) of the following:

(a) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(b)(1) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

1999: $.0094241 per unit sold after the date of enactment of this act;

2000: $.0104712 per unit sold;

For each of 2001 and 2002: $.0136125 per unit sold;

For each of 2003 through 2006: $.0167539 per unit sold;

For each of 2007 and each year thereafter: $.0188482 per unit sold.

(2) A tobacco product manufacturer that places funds into escrow pursuant to paragraph (1) of this subsection shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(A) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this subparagraph: (i) in the order in which they were placed into escrow; and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(B) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released

from escrow and revert back to such tobacco product manufacturer; or

(C) To the extent not released from escrow under subparagraphs (A) or (B) of this paragraph, funds shall be released from escrow and revert back to such tobacco product manufacturer twenty-five (25) years after the date on which they were placed into escrow.

(3) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this section shall annually certify to the attorney general that it is in compliance with this section. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

(A) Be required within fifteen (15) days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation of this section, may impose a civil penalty to be paid to the general fund of the state in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly withheld from escrow;

(B) In the case of a knowing violation, be required within fifteen (15) days to place such funds into escrow as shall bring it into compliance with

this section. The court, upon a finding of a knowing violation of this subsection, may impose a civil penalty to be paid to the general fund of the state in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and

(C) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary) for a period not to exceed two (2) years.

Each failure to make an annual deposit required under this section shall constitute a separate violation.

(4) In any action brought under this section, the court shall award the attorney general, if he is the prevailing party, reasonable costs, expenses and attorney's fees in bringing his action.

Tobacco Master Settlement Agreement Complementary Act

I.C. § 39-8401. Findings and purpose

The legislature finds that violations of Idaho's tobacco master settlement agreement act threaten the integrity of Idaho's master settlement agreement with leading tobacco product manufacturers, the fiscal soundness of the state, and the public health. The legislature finds that enacting procedural enhancements will help prevent violations of Idaho's tobacco master settlement agreement act and thereby safeguard the master settlement agreement, the fiscal soundness of the state and the public health.

I.C. § 39-8402. Definitions

(1) "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional modifiers or descriptors including, but not limited to, "menthol," "lights," "kings," and "100s," and includes any brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

(2) "Cigarette" has the same meaning as that term is defined in section 39-7802(d), Idaho Code.

(3) "Commission" means the state tax commission for the state of Idaho.

(4) "Master settlement agreement" has the same meaning as that term is defined in section 39-7802(e), Idaho Code.

(5) "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating manufacturer.

(6) "Participating manufacturer" has the same meaning as that term is defined in section II(jj) of the master settlement agreement and all amendments thereto.

(7) "Qualified escrow fund" has the same meaning as that term is defined in section 39-7802(f), Idaho Code.

(8) "Stamping agent" means a person who is authorized to wholesale cigarettes or is required to affix tax stamps to packages or other containers of cigarettes as well as any person who pays a tobacco products tax on "roll your own" tobacco, pursuant to chapter 25, title 63, Idaho Code.

(9) "Tobacco product manufacturer" has the same meaning as that term is defined in section 39-7802(i), Idaho Code.

(10) "Units sold" has the same meaning as that term is defined in section 39-7802(j), Idaho Code.

I.C. § 39-8403. Certifications – Directory – Tax stamps

(1) Every tobacco product manufacturer whose cigarettes are sold in this state whether directly or through a wholesaler, distributor, retailer or similar intermediary or intermediaries shall execute and deliver on a form prescribed by the attorney general a certification to the attorney general no later than the thirtieth day of April each year, certifying, under penalty of perjury, that, as of the date of such certification, such tobacco product manufacturer is either: a participating manufacturer; or in full compliance with section 39-7803(b), Idaho Code, including all quarterly installment payments required by section 39-8405(5), Idaho Code.

(a) A participating manufacturer shall include in its certification a list of its brand families. The participating manufacturer shall update such list thirty (30) days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general.

(b) A nonparticipating manufacturer shall include in its certification a complete list of all of its brand families that were sold in the state at any time during the preceding calendar year, or that have been sold in the state at any time during the current calendar year, and shall:

(i) List, for each brand family, the number of units sold in the state during the preceding calendar year;

(ii) Note, by means of an asterisk, any brand family sold in the state during the preceding calendar year that is no longer being sold in the state as of the date of such certification;

(iii) Identify by name and address any other manufacturer of such brand families in the preceding calendar year or the current calendar year. The nonparticipating manufacturer shall update such list thirty (30) days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the attorney general;

(c) In the case of a nonparticipating manufacturer, such certification shall further certify:

(i) That such nonparticipating manufacturer is registered to do business in the state or has appointed an agent for service of process and provided notice thereof as required by section 39-8404, Idaho Code;

(ii) That such nonparticipating manufacturer has:

1. Established and continues to maintain a qualified escrow fund;

2. Executed a qualified escrow agreement that has been reviewed and approved by the attorney general and that governs the qualified escrow fund;

(iii) That such nonparticipating manufacturer is in full compliance with section

39-7803(b), Idaho Code, and this section, and any rules promulgated pursuant thereto.

(iv) 1. The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund required pursuant to section 39-7803(b), Idaho Code, and all rules promulgated thereto;

2. The account number of such qualified escrow fund and any subaccount number for the state of Idaho;

3. The amount such nonparticipating manufacturer placed in such fund for cigarettes sold in the state during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the attorney general to confirm the foregoing;

4. The amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to section 39-7803(b), Idaho Code, and all rules promulgated thereto.

(d) A tobacco product manufacturer may not include a brand family in its certification unless:

(i) In the case of a participating manufacturer, said participating manufacturer affirms that the brand family is to be deemed

to be its cigarettes for purposes of calculating its payments under the master settlement agreement for the relevant year, in the volume and shares determined pursuant to the master settlement agreement; and

(ii) In the case of a nonparticipating manufacturer, said nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of section 39-7803(b), Idaho Code. Nothing in this section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the master settlement agreement or for purposes of section 39-7803(b), Idaho Code.

(e) Tobacco product manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five (5) years, unless otherwise required by law to maintain them for a greater period of time.

(2) Not later than September 30, 2003, the attorney general shall develop and publish on his website a directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of subsection (1) of this section, and all brand families that are listed in such certifications, except as noted below.

(a) The attorney general shall not include or retain in such directory the name or brand

families of any nonparticipating manufacturer that fails to provide the required certification or whose certification the attorney general determines is not in compliance with subsections (1)(b) and (c) of this section, unless the attorney general has determined that such violation has been cured to the satisfaction of the attorney general.

(b) Neither a tobacco product manufacturer nor a brand family shall be included or retained in the directory if the attorney general concludes in the case of a nonparticipating manufacturer that:

(i) Any escrow payment required pursuant to section 39-7803(b), Idaho Code, for any period and for any brand family, whether or not listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the attorney general; or

(ii) Any outstanding final judgment, including interest thereon, for a violation of Idaho's tobacco master settlement agreement act has not been fully satisfied for such brand family and such manufacturer.

(c) The attorney general shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand families to keep the directory in conformity with the requirements of this chapter. The attorney general shall transmit by electronic mail, if possible, or by other means as are reasonable to each stamping agent, notice of the

addition to, or removal from, the directory of any tobacco product manufacturer or brand family.

(d) Every stamping agent shall provide and update as necessary a mailing address and, where available, an electronic mail address to the attorney general for the purpose of receiving any notifications as may be required by this chapter.

(3) It shall be unlawful for any person:

(a) To affix a stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory;

(b) To sell, offer or possess for sale in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory;

(c) To acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of this subsection (3).

(4) Nothing in this chapter shall excuse payment of cigarette taxes under chapter 25, title 63, Idaho Code, by any person in regard to any package or other container of cigarettes not included in the directory but sold by that person.

(5) The attorney general may condition certification of a nonparticipating tobacco product manufacturer upon obtaining from the manufacturer its consent to be sued in Idaho district court for purposes of the state of Idaho enforcing any provisions of chapter 78

or 84, title 39, Idaho Code, or for the state bringing a released claim as that term is defined by subsection (g) of section 39-7802, Idaho Code.

I.C. 39-8405. Reporting of information – Escrow installments

(1) Not later than twenty (20) calendar days after the end of each calendar quarter, and more frequently if so directed by the attorney general, each stamping agent shall submit such information as the attorney general requires to facilitate compliance with this chapter including, but not limited to, a list by brand family of the total number of cigarettes for which the stamping agent affixed stamps during the previous calendar quarter or otherwise paid the tax due for such cigarettes. The stamping agent shall maintain, and make available to the attorney general, all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the attorney general for a period of five (5) years.

(2) The commission is authorized to disclose to the attorney general any information received under this chapter or Idaho's tobacco master settlement agreement act and requested by the attorney general for purposes of determining compliance with and enforcing the provisions of this chapter. The commission and attorney general shall share with each other the information received under this chapter or chapter

25, title 63, Idaho Code, and may share such information with other federal, state or local agencies only for purposes of enforcement of this chapter, Idaho's tobacco master settlement agreement act, or corresponding laws of other states.

(3) The attorney general may require at any time from the nonparticipating manufacturer proof, from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with Idaho's tobacco master settlement agreement act, of the amount of money in such fund, exclusive of interest, and the amount and date of each deposit to the fund, and the amount and date of each withdrawal from the fund.

(4) In addition to the information required to be submitted pursuant to this chapter, the attorney general may require a stamping agent or tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the attorney general to determine whether a tobacco product manufacturer or stamping agent is in compliance with this chapter.

(5) To promote compliance with the provisions of this chapter, the attorney general may promulgate rules requiring a tobacco product manufacturer subject to the requirements of section 39-7803(b), Idaho Code, to make the escrow deposits required in quarterly installments during the year in which the sales covered by such deposits are made. The attorney

general may require production of information sufficient to enable the attorney general to determine the adequacy of the amount of the installment deposit.

I.C. § 39-8406. Penalties and other remedies

(1) Each stamp affixed, each sale or offer to sell, and each cigarette possessed in violation of section 39-8403(3), Idaho Code, shall constitute a separate violation. For each violation hereof, the district court may impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or five thousand dollars ($5,000) upon a determination of violation of section 39-8403(3), Idaho Code, or any rule adopted pursuant thereto.

(2) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a stamping agent has violated section 39-8403(3), Idaho Code, or any rule adopted pursuant thereto, the commission may revoke or suspend the license of any stamping agent in the manner provided by law.

(3) Any cigarettes that have had stamps affixed, been sold, offered for sale or possessed for sale in this state in violation of section 39-8403(3) shall be deemed contraband under section 63-2513, Idaho Code, and such cigarettes shall be subject to seizure and forfeiture by the commission as provided in such

section, and all such cigarettes so seized and forfeited shall be destroyed and not resold.

(4) The attorney general may seek an injunction to prevent or restrain a threatened or actual violation of section 39-8403(3), 39-8405(1) or 39-8405(4), Idaho Code, by a stamping agent and to compel the stamping agent to comply with such subsections.

(5) A person who violates section 39-8403(3), Idaho Code, engages in an unfair and deceptive trade practice in violation of the Idaho consumer protection act, chapter 6, title 48, Idaho Code.

No. 09-1471

FILED

JAN 25 2010

In The
Supreme Court of the United States

SCOTT B. MAYBEE, d/b/a SMARTSMOKER.COM, BUYCHEAPCIGARETTES.COM, and ORDERSMOKESDIRECT.COM,

Petitioner,

vs.

STATE OF IDAHO by and through LAWRENCE G. WASDEN, Attorney General,

Respondent.

On Petition For Writ Of *Certiorari* To The Supreme Court Of Idaho

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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RESPONDENT STATE OF IDAHO'S STATEMENT OF THE QUESTIONS PRESENTED

1. Does recent enactment of the Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154, 124 Stat. 1087, render this petition unworthy of the granting of *certiorari*?

2. Does Idaho's regulation of the retail sale and shipment of cigarettes to Idaho consumers in Idaho conflict with the dormant Commerce Clause of the United States Constitution because Petitioner is located in New York?

3. Is Idaho's regulation of the retail sale and shipment of cigarettes to Idaho consumers in Idaho preempted by federal law because Petitioner is a member of the Seneca Indian Nation?

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STATEMENT

The State of Idaho heavily regulates the sale and shipment of cigarettes in Idaho. The Idaho Legislature has stated its reasons for such regulation: Noting that the Surgeon General has determined that smoking causes lung cancer, heart disease, and other serious diseases, the Legislature found that smoking poses serious public health and financial concerns for Idaho. *See* Idaho Code § 39-7801(a)-(c). Equally of concern, as expressed by the Legislature, is youth access to and usage of tobacco products. *See* Idaho Code § 39-5701.

Idaho has responded to these concerns with the enactment of a variety of laws regulating the sale of tobacco products in Idaho, two of which are relevant to this case: (1) Idaho's Prevention of Minors' Access to Tobacco Act ("Minors' Access Act"), codified at title 39, chapter 57, Idaho Code; and (2) Idaho's Tobacco Master Settlement Agreement Complementary Act ("Complementary Act"), codified at title 39, chapter 84, Idaho Code.

The Minors' Access Act is designed to reduce youth access to and usage of tobacco products. One way the Idaho Legislature seeks to accomplish this goal is section 39-5704 of the Act, which prohibits the sale, distribution, or offering of tobacco products at retail without the retailer having first obtained a tobacco permit from the Idaho Department of Health and Welfare. Tobacco permittees are subject to Department oversight and statutory regulation, including

inspections and compliance checks regarding their duties under the Act. *See* Idaho Code §§ 39-5704 and 39-5710. Section 39-5709 of the Act states that the sale or distribution of tobacco products without a permit is considered "an effort to subvert the state's public purpose to prevent minor's access to tobacco products."

In 2003, the Idaho Legislature expanded the scope of the Minors' Access Act to cover tobacco products sold over the Internet. *See* 2003 Idaho Sess. Laws. ch. 273. Such sales are defined as "delivery sales" by Section 39-5702(2) of the Act. The Legislature made clear that Internet tobacco retailers are to comply with all regulation of tobacco sales applicable to the more traditional ways in which tobacco products are sold and used, including, without limitation, compliance with the Complementary Act. *See* Idaho Code § 39-5714 of the Minors' Access Act.

The Complementary Act governs which cigarettes and which tobacco companies can sell cigarettes in Idaho. It requires, in part, that all tobacco companies whose cigarettes are sold in Idaho first certify themselves and their cigarette brands for sale with the Idaho Attorney General. The Act also establishes the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families ("Idaho Directory") and requires the Idaho Attorney General to list on this Directory only those tobacco companies and their brand families that have been certified for sale in

Idaho. *See* Idaho Code § 39-8403.[1] Relevant to this case, section 39-8403 of the Complementary Act makes it unlawful for any person to sell, offer or possess for sale in Idaho cigarettes of a tobacco company or brand family not included on the Idaho Directory.

The federal government, too, regulates tobacco products. Recently, and relevant to this appeal, Congress enacted the Prevent All Cigarette Trafficking Act ("PACT Act"). Pub. L. No. 111-154, 124 Stat. 1087. The PACT Act amends federal law in a variety of ways. In addition to now generally prohibiting the Post Office from mailing cigarettes, *see* 18 U.S.C. § 1716E(a) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1103, App. 6, the PACT Act amends the Jenkins Act to cover Internet cigarette sellers such as Petitioner.[2] Significant to this appeal, the PACT Act amends the Jenkins Act to provide that delivery sellers such as Petitioner comply with "all State, local, tribal and other laws generally applicable to sales of cigarettes or smokeless tobacco **as if the delivery sales occurred entirely within the specific State**

[1] The Idaho Attorney General has made the Idaho Directory available online at http://www2.state.id.us/ag/consumer/tobacco/directory_index.htm.

[2] Specifically, the PACT Act amends the Jenkins Act by defining the term "delivery sale" as the sale of cigarettes where the consumer submits the order for the cigarettes by means of a telephone, the mails, the Internet or other online service and the term "delivery seller" as one who makes a delivery sale. *See* 15 U.S.C. § 375(5) and (6) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1088-89, App. 2-3.

and place." 15 U.S.C. § 376a(a)(3) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1091, App. 5 (emphasis supplied). Thus, federal law mandates that Petitioner, with respect to his Internet cigarette sales to consumers located in Idaho, comply with Idaho state tobacco sales laws such as the Minors' Access and Complementary Acts.

The material facts that were before Idaho's courts and that are before this Court must be viewed against this background. Those facts, in brief summary, establish:

(1) Petitioner sold, collected money from, and shipped millions of cigarettes to Idaho consumers, over 2.5 million of which are of cigarette brands that have been and are still today illegal under the Complementary Act to be sold in Idaho, because the cigarettes Petitioner was selling were not listed on the Idaho Directory;

(2) Idaho consumers paid, signed for, and received these cigarettes in Idaho; and

(3) Petitioner sold, collected money from, and shipped the cigarettes at issue to Idaho consumers in Idaho without his obtaining the tobacco permit required by the Minors' Access Act.

See Pet. App. 8, 12, 32-33.

Petitioner's violations of the Complementary Act are apparent. As previously noted, the Act, in part,

prohibits "any person" from selling, offering, or possessing for sale in Idaho "cigarettes of a tobacco product manufacturer or brand family not included in the directory." Idaho Code § 39-8403(3)(b). The undisputed fact is that Petitioner sold 2.5 million cigarettes to Idahoans that were never on the Idaho Directory. Petitioner's violations of the Minors' Access Act are no less apparent. Despite selling millions of these cigarettes at retail to Idaho consumers, Petitioner never applied for nor held a tobacco permit as required by Idaho Code Section 39-5704 of that Act.

Petitioner raised various issues before the Idaho Supreme Court, three of which he pursues here. With respect to his claim that the Complementary Act violates the Commerce Clause, the Idaho Supreme Court correctly noted that state legislation may violate the dormant Commerce Clause if it (1) facially discriminates in favor of intrastate interests, *citing United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338 (2007); (2) places a burden on commerce outweighed by its local benefits, *citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); or (3) attempts to regulate conduct occurring entirely outside the State, *citing Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Pet. App. 23-25.

Applying these rules, the Idaho Supreme Court noted that the Complementary Act does not discriminate against interstate commerce and does not benefit in-state economic interests at the expense of out-of-state economic interests. Further, the Court

ruled that the burdens on interstate commerce do not outweigh the local benefits of the Complementary Act's regulation. Finally, the Court stated that the Complementary Act does not regulate commerce occurring wholly outside Idaho's boundaries, but only those sales to Idaho consumers who are located, pay for, and receive shipment of the cigarettes in Idaho. Pet. App. 25-27. Accordingly, the Court correctly found that the Complementary Act does not violate the Commerce Clause.

Petitioner also claimed below that federal common law preempted application of Idaho law to his business operations because he is a member of the Seneca Indian Nation, living and conducting business on his reservation in New York. The Idaho Supreme Court decided this issue by explaining that whether the Complementary Act is preempted depends upon (1) whether the conduct at issue occurs on or off reservation; (2) whether the party being regulated is a tribal member; and (3) if the regulated conduct occurs on reservation, whether State interests outside the reservation are implicated. Pet. App. 31.[3]

The Idaho Supreme Court acknowledged that Petitioner is a member of the Seneca Indian Nation. The Court found, though, that neither the Minors' Access nor the Complementary Act regulates his on-reservation activities. Instead, the Acts apply to his

[3] Petitioner agrees that this is the correct methodology to utilize. Pet. 31.

off-reservation activities of selling at retail and shipping to consumers in Idaho, without the necessary Minors' Access Act permit, cigarettes that are not listed on the Idaho Directory in violation of the Complementary Act. The Court noted that a concern of the Complementary Act is introducing "Non-compliant Cigarettes into Idaho" and a concern of the Minors' Access Act is introducing tobacco products "into Idaho," at retail, by those without a permit to do so. Pet. App. 33.

Relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Nevada v. Hicks*, 533 U.S. 353 (2001) for the proposition that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State," *Mescalero Apache*, 411 U.S. at 148-49, the Idaho Supreme Court found no conflicting federal law and that the Acts are non-discriminatory in application. Accordingly, the Court concluded that the Minors' Access and Complementary Acts are not preempted by operation of federal law. Pet. App. 33-34.

The Idaho Supreme Court did not rule on two issues that Petitioner raises here, because Petitioner never raised them before now. The first is whether the Import-Export Clause, Article I, §10, cl. 2 of the United States Constitution, invalidates the Complementary Act and another Idaho law, the Idaho Tobacco Master Settlement Agreement Act ("MSA Act"), codified at title 39, chapter 78, Idaho Code. The

second is whether the Commerce Clause preempts the MSA Act.

ARGUMENT

I. There Is No Compelling Reason to Grant *Certiorari*

Rule 10 of the Supreme Court Rules provides that a writ of *certiorari* is a matter for judicial discretion, and will be granted **only** for compelling reasons. The Idaho Supreme Court's decision in this case and its application of applicable law do not conflict with any decision of this Court, do not conflict with any decision of any other Circuit Court, and do not conflict with a decision of any state court of last resort, let alone any state appellate court. Indeed, the Idaho Supreme Court's decision is consistent with those appellate courts that have reviewed the very issues Petitioner raises here.[4] Further, Congress has made clear that Petitioner, with respect to his Internet cigarette sales to Idaho consumers, must comply with the very Idaho tobacco sales laws that Petitioner objects to in his *certiorari* petition. The PACT Act, in short, eviscerates any ongoing significance of the issues as to which Petitioner seeks review.

[4] Petitioner is the named party in the two other appellate decisions to rule on the same issues in the same way that the Idaho Supreme Court ruled. *See Dept. of Health and Human Servs. v. Maybee*, 965 A.2d 55 (Me. 2009); *State v. Maybee*, 235 Or. App. 292, 2010 WL 1878752 (Or. Ct. App. May 12, 2010).

II. Idaho's Regulation of the Retail Sale and Shipment of Cigarettes to Idaho Consumers in Idaho Does Not Conflict with the Commerce Clause of the United States Constitution

Petitioner contends that the Complementary Act violates the Commerce Clause. Putting aside, as discussed above, that federal law specifically requires Petitioner to comply with this Act "as if [his] delivery sales occurred entirely within" the State of Idaho, *see* 15 U.S.C. § 376a(a)(3) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1091, App. 5, there is no Commerce Clause violation.

While the Commerce Clause generally is invoked as authority for federal legislation, the so-called dormant component limits the States' ability to enact legislation that adversely affects interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Idaho Supreme Court is correct that state legislation such as the Complementary Act may violate the dormant component of the Commerce Clause if (1) it facially discriminates in favor of intrastate interests; *see United Haulers Ass'n*, 550 U.S. at 338; (2) it places a burden on commerce outweighed by its local benefits, *see Pike*, 397 U.S. at 142; or (3) it attempts to regulate conduct occurring entirely outside the State, *see Healy*, 491 U.S. at 336. Here, however, none of these concerns exists.

First, the Complementary Act does not discriminate against Petitioner or other out-of-state Internet

cigarette sellers in favor of intrastate cigarette retailers and does not impose additional burdens on him as an out-of-state retailer. It also does not benefit in-state economic interests at the expense of out-of-state economic interests. No matter where a retailer resides, that individual or entity may sell and ship to Idahoans in Idaho only the cigarette brands of the manufacturers listed on Idaho's Directory.

Second, the burden on interstate commerce is not greater than or excessive of the benefit conferred by the Complementary Act. The Idaho Legislature declared when enacting the Complementary Act that its passage would, in part, safeguard "the fiscal soundness of the state and the public health." Idaho Code § 39-8401. Further, as noted by the Second Circuit Court of Appeals in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 218 (2nd Cir. 2004), in a case addressing essentially the same issue raised now before this Court,

> **Any incidental burdens on products originating out-of-state** – i.e., the so-called embargoing of the cigarettes of NPMs purchased by appellants **is a result of their failure to comply with the Escrow and Contraband Statutes**, a burden that is no greater for out-of-state economic interests than for in-state ones.

(Internal citations and quotations omitted; emphasis supplied).[5]

Third, the Complementary Act does not regulate commerce occurring **wholly outside** Idaho's border. The Act applies and seeks to regulate only the retail sale of tobacco products that are purchased by and shipped to consumers in Idaho. While the stream of commerce flows back and forth between Petitioner's New York retail operation and Idaho consumers, such commerce occurs as much, if not more, inside Idaho's borders where the cigarettes are ordered, paid for, and received by Idaho consumers.

In summary, Petitioner's Commerce Clause claim lacks merit. And given Congress' decree that Internet cigarette sellers like Petitioner comply with the Complementary Act "as if [his] delivery sales occurred entirely within" Idaho, it is even clearer that this issue is not worthy of *certiorari* being granted. The PACT Act eliminates any claimed importance of the dormant Commerce Clause question raised by Petitioner.

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[5] In *Freedom Holdings*, several cigarette importers argued that New York's tobacco laws (termed "contraband statutes" by the court there and serving the functionally equivalent purpose as the Complementary Act here) violated, among other things, the dormant Commerce Clause. *See id.* at 209. The Second Circuit rejected the plaintiffs' Commerce Clause claim in that case.

III. Petitioner Did Not Raise Before the Idaho Supreme Court Any Argument that the Complementary and Idaho MSA Acts Conflict With the Import-Export Clause of the United States Constitution or that the Idaho MSA Act Conflicts with the Commerce Clause

Petitioner did not raise before the Idaho Supreme Court the issue of whether the Complementary Act or the MSA Act conflicts with the Import-Export Clause of the United States Constitution. Petitioner also did not raise the issue of whether the MSA Act conflicts with the Commerce Clause of the United States Constitution. As such, this Court should not address the issues. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"). Even if the Court were to address either issue, however, *certiorari* should not be granted with respect to these two Idaho laws and the issues raised here for the first time.

First, with respect to the MSA Act, the reason this issue was not raised below is because the law does not apply to Petitioner and his Internet cigarette sales business. The basic provisions of the MSA Act require all tobacco **manufacturers** whose cigarettes are sold in Idaho either to (1) execute the Master

Settlement Agreement[6] and become subject to its obligations, or (2) deposit into a "qualified escrow fund" a fixed sum for each cigarette that has been taxed and stamped with an Idaho excise tax stamp. *See* Idaho Code § 39-7803. Petitioner is not a tobacco product manufacturer but an Internet cigarette **retailer**. He has no obligations under the MSA Act. He was not pursued by Idaho for any violation of this law. His desire to challenge the MSA Act here, after the Idaho courts have reviewed the various issues he did raise before them, is not appropriate and should not be allowed.

Second, the Import-Export Clause does not apply either to the Complementary or MSA Acts. The Import-Export Clause, Article I, § 10, cl. 2, provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports." Putting aside the debate of whether this clause is limited to foreign trade, *compare Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), *with Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520

[6] In November 1998, leading United States tobacco companies entered into a settlement agreement, entitled the "Master Settlement Agreement," or "MSA" with Idaho. The MSA has been described by this Court as a "landmark" public health agreement, *Lorillard Tobacco Corp. v. Reilly*, 533 U.S. 525, 533 (2001), that addresses "one of the most troubling public health problems facing the Nation today." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The MSA is a lengthy public document. The Idaho Attorney General has made the MSA electronically available at: http://www2.state.id.us/ag/consumer/tobacco/MSA.pdf.

U.S. 564, 624-36 (1997) (Thomas, J., dissenting), it is undisputed that what the Clause is directed at is the levy of certain **taxes**. *See, e.g., Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287 (1976) ("[I]mposts and duties . . . are essentially taxes on the commercial privilege of bringing goods into a country"). This is important because neither the Complementary Act nor the MSA Act imposes any tax.

It is true that the MSA Act requires tobacco companies that opt not to join the MSA to deposit money into an escrow account for certain cigarettes that are sold in Idaho. The MSA Act provides, however, that tobacco manufacturers which place funds into escrow shall receive the interest or other appreciation on such funds as earned which may ultimately, after 25 years, be returned to the tobacco manufacturer if Idaho does not obtain a judgment against the company based upon a claim or claims related to the use, sale, marketing, or distribution of its tobacco products. Idaho Code § 39-7803(b)(2). In short, the escrow deposit requirements of the MSA Act are not tax assessments and the Import-Export Clause offers Petitioner no refuge.

Third, the MSA Act does not violate the Commerce Clause. It does not discriminate against interstate commerce and does not benefit in-state economic interests at the expense of out-of-state economic interests. No matter where a manufacturer resides, that company may sell and ship to Idaho its various cigarette brands if compliant with the uniformly applicable provisions of the MSA Act. The Act's

burden on interstate commerce, to the degree there is such a burden, is not greater than or excessive of the benefit conferred by its provisions. *See* Idaho Code § 39-7801 (setting forth the various state interests served by enactment of the MSA Act). Idaho deems these interests critical. Indeed, when it became clear to the Legislature that too many tobacco companies were violating the MSA Act and undermining the interests that Act is designed to serve, it enacted the Complementary Act to bolster enforcement. *See* Pet. App. 3-4; Idaho Code § 39-8401. Finally, the MSA Act does not regulate commerce occurring **wholly outside** Idaho's border. It applies and seeks to regulate only the sale of stamped, tax-collected cigarettes that are sold to purchasers in Idaho.

IV. Idaho's Regulation of the Retail Sale and Shipment of Cigarettes to Idaho Consumers in Idaho Is Not Preempted by Federal Law Because of Petitioner's Status as a Member of the Seneca Indian Nation

A. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court was asked to prohibit New Mexico from imposing a gross receipts tax on revenue generated from a tribal ski resort and a use tax on materials employed in constructing the resort's lifts. The resort was located just outside the tribe's reservation on land leased from the United States Forest Service. *Id.* at 146. The resort's location was critical because "in the special area of state taxation, absent cession of jurisdiction or other federal statutes

permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Id.* at 148. "[T]ribal activities conducted outside the reservation present different considerations[,]" however, and in that situation "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

With that principle in mind, this Court found the gross receipts tax permissible, given the resort's location, but deemed the use tax preempted by virtue of a provision in the Indian Reorganization Act, 25 U.S.C. § 465, that proscribes taxation of land taken into trust for a tribe or tribal member. On the latter point, it reasoned that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465," 411 U.S. at 155 n.11, since the ski lifts had been permanently attached to the land and "[t]he jurisdictional basis for use taxes is the use of the **property** in the State." *Id.* at 158 (emphasis supplied). The differing result with regard to the use tax thus derived from the combination of an explicit congressional directive satisfying the "express federal law to the contrary" exception to the general rule and the nature of the conduct that triggered the tax obligation as a matter of state law.

This Court applied *Mescalero Apache* most recently in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), where it upheld imposition of a state fuel tax on an off-reservation distributor with respect to purchases by a tribal retailer for on-reservation sale. This Court rejected the proposition that the tax's validity must be assessed under the interest-balancing test governing on-reservation transactions prescribed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), because "[w]e have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country." 546 U.S. at 112. That "altogether different course" was *Mescalero Apache* which controlled in light of the off-reservation "where" of the Kansas fuel tax – *i.e.*, the fact that the tax accrued upon receipt of the fuel by the distributor at its off-reservation place of business. This Court reasoned that "the 'use, sale or delivery' that **triggers** tax liability is the sale or delivery of the fuel to the distributor." *Id.* at 107 (emphasis supplied).

Mescalero Apache and *Wagnon* establish the fundamental framework against which Petitioner's Indian law-based preemption claim must be measured. The requirements of the Complementary and Minors' Access Acts, as made clear by the Idaho Supreme Court in interpreting these two Acts, are "trigger[ed]" for present purposes by his **introduction** of tobacco into Idaho, not by the simple fact that an Idaho resident chooses to purchase cigarettes from a vendor whose physical place of business is located outside

the State. If an Idaho resident traveled to New York to purchase and receive his cigarettes, the Acts would not apply. The critical "where" of the transaction is thus Idaho, not Petitioner's New York place of business. Petitioner is treated no differently than other remote vendors, and the fact that he is located on his tribe's reservation adds nothing to his cause since that fact has no Supremacy Clause significance under this Court's Indian law jurisprudence.

In short, Petitioner's liability for violating the Complementary Act arises from selling and shipping to Idaho consumers cigarettes that are not on the Idaho Directory, while his violation of the Minors' Access Act stems from failure to obtain a tobacco permit for those retail cigarette sales. Neither of these violations depends upon where he does business; *i.e.*, the "trigger[ing]" event for statutory coverage is the fact that he causes cigarettes to be introduced into this State.

B. Before this Court, Petitioner focuses his appeal on the Idaho Supreme Court's decision not to apply this Court's interest-balancing test for analyzing on-reservation transactions prescribed in *Bracker*, 448 U.S. at 144. Petitioner's argument is that because he is on his reservation, this is enough to require *Bracker's* interest balancing test to be employed. Pet. 33. Petitioner's argument fails at least for two reasons.

First, and tellingly, Petitioner does not show, or attempt to show, that application of the *Bracker* test

here would have changed the result. *Bracker* involved the question whether Arizona could impose motor carrier license and use fuel taxes on a nontribal firm with respect to on-reservation timber hauling undertaken pursuant to a contract with the resident tribe. In answering this question, this Court set out an analytical test that subsequently has been employed when a State regulates commercial transactions between tribes and nonmembers on reservation:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 144-45. Here, those interests manifestly weigh against Petitioner.

Federal law – specifically 42 U.S.C. § 300x-26 – encourages states to adopt laws – such as the Minors' Access Act – that prohibit sales of tobacco products to persons under the age of 18 by providing grants from the Department of Health and Human Services. As discussed above, the PACT Act also directs Internet

cigarette sellers like Petitioner to comply with Idaho's tobacco sales laws. Congress thus has affirmatively approved and indeed required compliance with State regulatory schemes like the Minors' Access and Complementary Acts. This congressional affirmation of state authority is, Idaho respectfully suggests, as relevant to pre-PACT Act transactions as to those now for purpose of assessing Idaho's regulatory interests. For *Bracker*-based analytical purposes, therefore, the federal interest militates strongly toward these Acts' enforceability here.

Idaho's interest in preventing minors from smoking is obvious and singularly compelling. *See N.H. Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 206 (D. Me. 2005) ("Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its children, Congress would vote to prohibit what Maine is trying to do"), *aff'd in part and rev'd in part*, 448 F.3d 66 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008).

The permit requirement of the Minors' Access Act contributes to Idaho's efforts at controlling the ability of minors to obtain tobacco by ensuring that the Idaho Department of Health and Welfare has a central repository of all businesses marketing tobacco to Idaho residents with a uniform set of data which facilitates compliance monitoring and, where necessary, enforcement actions. Moreover, as noted above,

the Minors' Access Act explicitly provides that the retail sale or distribution of tobacco products without a permit is to be considered "an effort to subvert the state's public purpose to prevent minor's access to tobacco products." Idaho Code § 39-5709. The Complementary Act comparably provides that, with respect to the State's interest in regulating which cigarettes can be sold in Idaho, Idaho's fiscal soundness and the public health are at stake. *See* Idaho Code § 39-8401.

Petitioner, moreover, does not make even a colorable attempt to identify a compelling tribal interest furthered by prohibiting Idaho from regulating the introduction of a concededly dangerous product into its jurisdiction for purposes of in-state consumption. Plainly enough, such regulation does not touch upon the control of internal relations that serves as the touchstone for determining the reach of tribal self-governance. *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2719 (2008) ("the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits except themselves'").

Finally, to characterize the burden on Petitioner of submitting annually to a no-charge permit application for his operations as "minimal," if anything, overstates the impact; the burden is virtually non-existent. The Minors' Access Act permit obligation is easily discharged. Indeed, it is far less intrusive on Petitioner's time and resources than the

record-keeping and tax collection duties approved by this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980). Similarly, Petitioner does not explain the undue burden of selling only those cigarettes that are listed on the Idaho Directory.[7]

Second, while application of the *Bracker* interest-balancing analysis supports Idaho here, the Idaho Supreme Court was correct in ruling that *Bracker* does not apply in this case. This Court has made clear, most recently in *Wagnon*, 546 U.S. at 112, that where the regulated conduct occurs off reservation, *Bracker* interest-balancing has no analytical role in determining a preemption challenge. And given, as the Idaho Supreme Court ruled, that the Minors' Access and Complementary Acts regulate the **introduction into Idaho of cigarettes sold to Idaho consumers located in Idaho**, the regulated conduct in this case is off reservation. In such circumstances, the analysis to be employed, first set forth by this Court in *Mescalero Apache*, 411 U.S. at 148-49, controls. Tellingly, Petitioner does not even attempt to contend that under *Mescalero Apache* federal law preempts the Minors' Access or Complementary Acts.

[7] A review of Idaho's Tobacco Directory reveals that at present there are 36 tobacco companies selling 179 different cigarette brands that may be lawfully sold in Idaho.

The reason is clear: Under that analysis neither Act is preempted by federal law.[8]

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[8] Nothing in the PACT Act alters these Indian law principles. *See* Pub. L. No. 111-154, Stat. 1109-10, Sec. 5, App. 7-9. Further, given that the PACT Act requires delivery sellers like Petitioner to comply with "all State, local, tribal and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place," 15 U.S.C. § 376a(a)(3), *amended by* Pub. L. No. 111-154, 124 Stat. 1091, App. 5, Petitioner's post-PACT Act sales to Idaho consumers constitute off-reservation activity for purposes of applying *Mescalero Apache*. As with the dormant Commerce Clause challenge, therefore, Congress' action eliminates any purported importance of Petitioner's Supremacy Clause claim as an ongoing matter.

CONCLUSION

The State of Idaho respectfully requests that the instant Petition be denied.

Respectfully submitted this 25th day of June, 2010.

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RELEVANT EXCERPTS – PUBLIC LAW 111-154

* * *

SEC. 2. COLLECTION OF STATE CIGARETTE AND SMOKELESS TOBACCO TAXES.

(a) DEFINITIONS. – The Act of October 19, 1949 (15 U.S.C. 375 et seq.; commonly referred to as the "Jenkins Act") (referred to in this Act as the "Jenkins Act"), is amended by striking the first section and inserting the following:

"SECTION 1. DEFINITIONS.

"As used in this Act, the following definitions apply:

"(1) ATTORNEY GENERAL. – The term 'attorney general', with respect to a State, means the attorney general or other chief law enforcement officer of the State.

"(2) CIGARETTE. –

"(A) IN GENERAL. – The term 'cigarette' –

"(i) has the meaning given that term in section 2341 of title 18, United States Code; and

"(ii) includes roll-your-own tobacco (as defined in section 5702 of the Internal Revenue Code of 1986).

"(B) EXCEPTION. – The term 'cigarette' does not include a cigar (as defined in section 5702 of the Internal Revenue Code of 1986).

"(3) COMMON CARRIER. – The term 'common carrier' means any person (other than a local messenger service or the United States Postal Service) that holds itself out to the general public as a provider for hire of the transportation by water, land, or air of merchandise (regardless of whether the person actually operates the vessel, vehicle, or aircraft by which the transportation is provided) between a port or place and a port or place in the United States.

"(4) CONSUMER. – The term 'consumer' –

"(A) means any person that purchases cigarettes or smokeless tobacco; and

"(B) does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.

"(5) DELIVERY SALE. – The term 'delivery sale' means any sale of cigarettes or smokeless tobacco to a consumer if –

"(A) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

"(B) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence

of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

"(6) DELIVERY SELLER. – The term 'delivery seller' means a person who makes a delivery sale.

"(7) INDIAN COUNTRY. – The term 'Indian country' –

"(A) has the meaning given that term in section 1151 of title 18, United States Code, except that within the State of Alaska that term applies only to the Metlakatla Indian Community, Annette Island Reserve; and

"(B) includes any other land held by the United States in trust or restricted status for one or more Indian tribes.

"(8) INDIAN TRIBE. – The term 'Indian tribe', 'tribe', or 'tribal' refers to an Indian tribe as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) or as listed pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1).

"(9) INTERSTATE COMMERCE. –

"(A) IN GENERAL. – The term 'interstate commerce' means commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

"(B) INTO A STATE, PLACE, OR LOCALITY. – A sale, shipment, or transfer of cigarettes or smokeless tobacco that is made in interstate commerce, as defined in this paragraph, shall be deemed to have been made into the State, place, or locality in which such cigarettes or smokeless tobacco are delivered.

"(10) PERSON. – The term 'person' means an individual, corporation, company, association, firm, partnership, society, State government, local government, Indian tribal government, governmental organization of such a government, or joint stock company.

"(11) STATE. – The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

"(12) SMOKELESS TOBACCO. – The term 'smokeless tobacco' means any finely cut, ground, powdered, or leaf tobacco, or other product containing tobacco, that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.

"(13) TOBACCO TAX ADMINISTRATOR. – The term 'tobacco tax administrator' means the State, local, or tribal official duly authorized to collect the tobacco tax or administer the tax law of a State, locality, or tribe, respectively.

* * *

"SEC. 2A. DELIVERY SALES.

"(a) IN GENERAL. – With respect to delivery sales into a specific State and place, each delivery seller shall comply with

"(1) the shipping requirements set forth in subsection (b);

"(2) the recordkeeping requirements set forth in subsection (c);

"(3) all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing: –

"(A) excise taxes;

"(B) licensing and tax-stamping requirements;

"(C) restrictions on sales to minors; and

"(D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and

"(4) the tax collection requirements set forth in subsection (d).

* * *

SEC. 3. TREATMENT OF CIGARETTES AND SMOKELESS TOBACCO AS NONMAILABLE MATTER.

(a) IN GENERAL. – Chapter 83 of title 18, United States Code, is amended by inserting after section 1716D the following:

"§ 1716E. Tobacco products as nonmailable

"(a) PROHIBITION. –

"(1) IN GENERAL. – All cigarettes and smokeless tobacco (as those terms are defined in section 1 of the Act of October 19, 1949, commonly referred to as the Jenkins Act) are nonmailable and shall not be deposited in or carried through the mails. The United States Postal Service shall not accept for delivery or transmit through the mails any package that it knows or has reasonable cause to believe contains any cigarettes or smokeless tobacco made nonmailable by this paragraph.

"(2) REASONABLE CAUSE. – For the purposes of this subsection reasonable cause includes –

> "(A) a statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment, or
>
> "(B) the fact that the person is on the list created under section 2A(e) of the Jenkins Act.

* * *

SEC. 5. EXCLUSIONS REGARDING INDIAN TRIBES AND TRIBAL MATTERS.

(a) IN GENERAL. – Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect –

(1) any agreements, compacts, or other intergovernmental arrangements between any State or local government and any government of an Indian tribe (as that term is defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) relating to the collection of taxes on cigarettes or smokeless tobacco sold in Indian country;

(2) any State laws that authorize or otherwise pertain to any such intergovernmental arrangements or create special rules or procedures for the collection of State, local, or tribal taxes on cigarettes or smokeless tobacco sold in Indian country;

(3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;

(4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the

United States in trust for one or more Indian tribes; or

(5) any State or local government authority to bring enforcement actions against persons located in Indian country.

(b) COORDINATION OF LAW ENFORCEMENT. – Nothing in this Act or the amendments made by this Act shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by 1 or more States or other jurisdictions, including Indian tribes, through interstate compact or otherwise, that –

(1) provides for the administration of tobacco product laws or laws pertaining to interstate sales or other sales of tobacco products;

(2) provides for the seizure of tobacco products or other property related to a violation of such laws; or

(3) establishes cooperative programs for the administration of such laws.

(c) TREATMENT OF STATE AND LOCAL GOVERNMENTS. – Nothing in this Act or the amendments made by this Act shall be construed to authorize, deputize, or commission States or local governments as instrumentalities of the United States.

(d) ENFORCEMENT WITHIN INDIAN COUNTRY. Nothing in this Act or the amendments made

by this Act shall prohibit, limit, or restrict enforcement by the Attorney General of the United States of this Act or an amendment made by this Act within Indian country.

(e) AMBIGUITY. – Any ambiguity between the language of this section or its application and any other provision of this Act shall be resolved in favor of this section.

(f) DEFINITIONS. – In this section –

(1) the term "Indian country" has the meaning given that term in section 1 of the Jenkins Act, as amended by this Act; and

(2) the term "tribal enterprise" means any business enterprise, regardless of whether incorporated or unincorporated under Federal or tribal law, of an Indian tribe or group of Indian tribes.

* * *